

OFFICE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 491

**CORLISS LAMONT, DOING BUSINESS AS
BASIC PAMPHLETS, APPELLANT,**

vs.

POSTMASTER GENERAL OF THE UNITED STATES.

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

FILED SEPTEMBER 12, 1964

PROBABLE JURISDICTION NOTED DECEMBER 7, 1964

SUPREME COURT OF THE UNITED STATES

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**IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

♦ 63 Civ. 2422

BASIC PAMPHLETS, Plaintiff,

—against—

**THE POSTMASTER-GENERAL OF THE
UNITED STATES, Defendant.**

AMENDED COMPLAINT—Filed December 3, 1963

Plaintiff, by its attorneys, complaining of the defendant, The Postmaster-General of the United States, for its amended complaint, alleges:

1. This Court has jurisdiction under Article III, § 2 of the United States Constitution, under 28 U.S.C. 1331, 1339, 1356, 2201-2202, 2282 and 2284, and under § 10 of the Administrative Procedure Act 5 U.S.C. § 1009. The matter in controversy exceeds the sum of value of \$10,000, exclusive of interest and costs.

2. One of the purposes of this action is to enjoin the enforcement, operation and execution of an Act of Congress for repugnance to the Constitution. Hence, a three-judge Court is required to be convened under 28 U.S.C. §§ 2282, 2284.

3. Plaintiff is engaged in the business of publishing and distributing pamphlets and other literature on subjects of public interest, such as civil liberties, foreign relations, philosophy, and war and peace; plaintiff maintains his office in the City of New York.

4. The defendant is The Postmaster-General of the United States.

[fol. 2] 5. In connection with its work Basic Pamphlets receives publications sent to it from various places through-

out the United States and throughout the world, including England, France, Poland, The Soviet Union and China. The receipt of such publications is necessary to the effective publishing operations of the plaintiff since they constitute important sources of information for the plaintiff and are the subject of comments made by the plaintiff in its publications. It is important for the plaintiff to know what is written and said in other countries of the world in order effectively to comment upon those subjects.

6. Upon information and belief, the defendant has heretofore received from countries abroad for transmittal to the plaintiff, various unsealed mail addressed to the plaintiff bearing prepaid postage. The defendant, acting pursuant to 39 U.S.C. 4008, 76 Stat. 840 (hereinafter called "the statute") retained the said mail instead of delivering it to the plaintiff and notified the plaintiff that the Secretary of the Treasury "has determined this mail to be Communist political propaganda" and that the defendant would destroy it unless plaintiff formally requests in writing that such "Communist political propaganda" be delivered.

7. Upon information and belief, defendant, acting pursuant to 39 U.S.C. 4008, has set up various screening centers throughout the United States to examine mailed matter to determine whether it is "Communist political propaganda" within the provisions of that statute, and to forward through the mails such mailed matter determined to be within the provisions of that statute to addressees who have notified defendant of their desire to receive such mailed matter.

[fol. 3] 8. Upon information and belief, defendant has compiled lists or other records containing the names of persons who desire to receive mailed matter determined to be "Communist political propaganda", and has made such names available to other agencies of the Executive Branch of the United States Government and to committees of the Congress, including the Committee on Un-American Activities of the House of Representatives, and that such names have become, or may at some future time, become available to the public.

9. Plaintiff has declined to express a desire to defendant that plaintiff receive mailed matter determined by defendant to be "Communist political propaganda" on the ground that the said statute is unconstitutional and on the further ground that plaintiff does not wish to be included in any governmental list or record of persons desiring to receive "Communist political propaganda".

10. On August 13, 1963 plaintiff commenced this action by filing the original complaint herein.

11. Thereafter, by letter dated August 30, 1963, the Acting General Counsel of the Post Office Department advised plaintiff that the original complaint herein constituted a request within the meaning of the statute by plaintiff to receive "Communist political propaganda", and that postmasters at all foreign propaganda screening points were being advised not to detain mail addressed to plaintiff. A copy of that letter is annexed hereto as Exhibit A and made a part hereof.

12. Upon information and belief, defendant has added plaintiff's name to lists and records of persons desiring to receive "Communist political propaganda" and has distributed such list and records, containing plaintiff's name, as hereinabove alleged.

[fol. 4] 13. The statute is unconstitutional and void upon its face and as applied because:

a. it violates plaintiff's right to freedom of speech and press as guaranteed by the First Amendment to the United States Constitution;

b. it violates the due process clause of the Fifth Amendment to the United States Constitution in that it is vague, indefinite and uncertain and fails to provide adequate or any procedural safeguards for making the determination as to what is "Communist political propaganda", assuming such a determination can ever be made;

c. it violates the due process clause of the Fifth Amendment to the United States Constitution by creating an arbitrary and unreasonable classification, to wit:

persons desiring to receive Communist political propaganda, and impliedly stigmatizing members of that class and holding them up to opprobrium;

d. it violates the due process clause of the Fifth Amendment to the United States Constitution by creating an arbitrary and unreasonable classification, to wit: officials of United States Government agencies, public libraries, colleges, universities, graduate schools and scientific or professional institutions for advanced studies, which class is exempt from the provision of the statute, with the result that persons in the position of plaintiff are discriminated against.

[fol. 5] 14. Plaintiff has no adequate remedy at law, he will be required to resort to a multiplicity of actions and will suffer irreparable injury unless the relief prayed for is granted.

Wherefore, plaintiff prays that:

1. Jurisdiction be taken by a three-judge Court pursuant to 28 U.S.C. §§ 2282, 2284;

2. The Court, in pursuance of its jurisdiction under 28 U.S.C. § 2282, issue a preliminary injunction and a permanent injunction enjoining the defendant, his successors and subordinates, from carrying out or enforcing 39 U.S.C. 4008 on the ground that it is unconstitutional, and directing defendant to remove plaintiff's name from all lists and records he maintains of persons desiring to receive "Communist political propaganda"; and not to place plaintiff's name upon such a list;

3. The Court render a declaratory judgment that the plaintiff is entitled to receive mail from abroad without complying with 39 U.S.C. 4008 or the defendant's directive thereunder, and that 39 U.S.C. 4008 is unconstitutional on its face and as applied; and

4. The Court grant such other and further relief as may be just and proper in the premises.

Rabinowitz & Boudin, by Leonard B. Boudin, Member of the firm, Office & P.O. Address, 30 East 42nd Street, New York 17, New York.

[fol. 6]

EXHIBIT A TO AMENDED COMPLAINT

POST OFFICE DEPARTMENT

OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D. C. 20260

AUG 30 1963

Dr. Corliss Lamont
c/o Rabinowitz & Boudin
Attorneys at Law
30 E. 42nd Street
New York, New York 10017

Dear Dr. Lamont:

On August 13, 1963, civil action was filed in the Federal District Court of the Southern District of New York against the Postmaster General of the United States on behalf of an organization known as Basic Pamphlets, which, according to the complaint, is owned and managed by you.

This suit challenges the authority of the Postmaster General to detain mail addressed to Basic Pamphlets and challenges the Constitutionality of the legislation which authorized this detention.

It is the opinion of this office that this complaint constitutes an expression of desire by Basic Pamphlets and you as owner and manager to receive all of your mail whether or not the Customs Bureau of the Treasury Department considers it to be Communist political propaganda. Since 39 U.S.C. § 4008 states that "... detention shall not be required in the case of matter which is ... otherwise ascertained by the Postmaster General to be desired by the addressee.", I have issued instructions to the postmaster at New York City and to the postmasters at all other foreign propaganda screening points that any mail presently being

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detained be dispatched and that in the future mail addressed to Basic Pamphlets or to yourself not be detained.

Sincerely,

/s/ ADAM G. WENCHEL
Acting General Counsel

[fol. 7] Affidavit of Service (omitted in printing).

[fol. 8] [File endorsement omitted]
[Stamp—Memo. Endorsed].

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
63 Civ. 2422

[Title omitted]

NOTICE OF MOTION FOR SUMMARY JUDGMENT AND OTHER
RELIEF—Filed December 3, 1963

Sir:

Please Take Notice, that upon the amended complaint herein, the affidavits of Corliss Lamont, sworn to November 28, 1963, the affidavit of Leonard B. Boudin, sworn to November 27, 1963, and the annexed statement in accordance with Rule 9(g) of the General Rules of this Court, the undersigned will move this Court at a motion part thereof, to be held at Room 506, United States District Courthouse, Foley Square, New York, New York, on the 10th day of December, 1963 for an order

1. Amending the designation of plaintiff in the caption of the summons and complaint herein to read "Corliss Lamont, doing business as Basic Pamphlets", pursuant to Rule 60(a) of the Federal Rules of Civil Procedure.

2. Granting plaintiff summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact, and that plaintiff is entitled to judgment as a matter of law.

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[fol. 9] Please Take Further Notice, that, at the same time and place, the undersigned, pursuant to Rule 25 of the General Rules of this Court, will suggest to the Court the necessity of convening a three-judge court in conformity with 28 U.S.C. §§ 2282 and 2284 for the reason that the plaintiff seeks to restrain the enforcement and execution of an Act of Congress, namely Public Law 87-793, § 305(a), October 11, 1962, 76 Stat. 840, 39 U.S.C. § 4008, for repugnance to the Constitution of the United States, and that the undersigned accordingly will move for an order convening such a three-judge court for the consideration of the motion for summary judgment.

Dated: New York, New York, November 29, 1963.

Rabinowitz & Boudin, by Leonard B. Boudin, Attorneys for Plaintiff.

To: Robert M. Morgenthau, United States Attorney, Attorney for Defendant, Southern District of New York, United States Courthouse, Foley Square, New York, New York.

[fol. 10].

ATTACHMENT TO NOTICE

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civ. 2422

[Title omitted]

STATEMENT PURSUANT TO RULE 9(g)
OF THE GENERAL RULES

Plaintiff contends that there is no genuine issue to be tried with respect to the following material facts:

1. Plaintiff is engaged in the business of publishing and distributing pamphlets and other literature on subjects of public interest, such as civil liberties, foreign relations, philosophy, and war and peace.

2. Defendant, acting pursuant to 39 U.S.C. §4008, has detained mail addressed to plaintiff on the ground that the Secretary of the Treasury had determined it to be "Communist political propaganda" and notified plaintiff that such mail would not be delivered except upon the request of plaintiff.

3. Plaintiff has never requested defendant to deliver mail addressed to plaintiff which has been determined to [fol. 11] be "Communist political propaganda" pursuant to 39 U.S.C. §4008.

4. The United States Government maintains several "foreign propaganda screening units" at which all unsealed mail from foreign countries is examined to determine whether it is "Communist political propaganda", and to separate from such mail that addressed to persons exempt from the requirements of 39 U.S.C. §4008 and to persons who have requested that such mail be delivered to them.

5. Such foreign propaganda screening units each maintain lists and records of persons desiring to receive "Communist political propaganda".

6. On or about August 30, 1963, after the commencement of this action, defendant, by his acting general counsel, advised plaintiff by letter that he deemed plaintiff to have requested the receipt of "Communist political propaganda" by virtue of plaintiff's instituting this action.

7. Defendant has notified and advised each foreign propaganda screening unit to include plaintiff in its lists or records of persons desiring to receive "Communist political propaganda".

Rabinowitz & Boudin, By Leonard B. Boudin, Attorneys for Plaintiff.

[fol. 12]

ATTACHMENT TO NOTICE

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civ. 2422

[Title omitted]

State of New York,
County of New York, ss.:

CORLISS LAMONT, being duly sworn, deposes and says:

1. I am the plaintiff herein, and submit this affidavit in support of an application to convene a three-judge court and for summary judgment.
2. This action has been commenced to enjoin the enforcement of a federal statute, 39 U.S.C. 4008 (hereinafter called "the statute"), on the ground that it violates the United States Constitution. The statute requires the defendant to detain "mailed matter except sealed letters" determined to be "Communist political propaganda", and to advise the addressee that it will be delivered only upon the addressee's request.
3. I am advised, and believe, that the defendant, with the cooperation of other government departments, has set up several "foreign propaganda screening units" in the United States to examine all unsealed mail entering the country. One of the functions of such units is to determine whether mail, otherwise detainable as "Communist political propaganda", should be nevertheless delivered to the addressees because the addressees have requested the same or [fol. 13] are entitled to it as being within the statutory exemptions to the procedure.
4. In order to accomplish the screening task, it is inherently necessary that each screening unit maintain a record of the names of all persons who have requested that they receive matter deemed by the Secretary of the Treasury to be "Communist political propaganda". It is clear

that such records are not only kept, but that the names contained therein are systematically delivered to other government agencies and congressional committees.

5. As the proprietor of the enterprise Basic Pamphlets, I publish and distribute pamphlets and other literature on subjects of public interest. These include such matters as civil liberties, foreign relations, war and peace and similar matter of immediate concern to well informed citizens. In order to do this effectively, it is necessary for me to have access to publications from throughout the world. Many such publications express views and opinions, as well as facts, not otherwise available in the United States, and knowledge of them enables me to publish with a background and perspective I would otherwise lack.

6. I receive many unsolicited publications in the mail, some of which I find of no use in my work. Others, however, contain information which in one way or another is useful to me. Whether a publication is useful to me, or even worth reading, is a decision I can only make for myself.

7. Shortly after July 8, 1963, I received a notice from the Post Office Department, San Francisco, California, on POD Form 2153-x. The notice, a copy of which is annexed hereto as Exhibit 1 and made a part hereof, stated that the Post Office was holding mail described as "Peking Review [fol. 14] #12, 1963, 1 copy" addressed to plaintiff, that said mail had been determined to be "Communist political propaganda" and could not be delivered unless I returned the notice by July 29, 1963 after indicating thereon my express desire to receive it.

8. I did not return the notice or otherwise indicate that plaintiff desired to receive such mail, and instead instructed my attorneys to commence this action. I am advised that the original complaint was filed August 13, 1963.

9. In a letter dated August 30, 1963 from the Acting General Counsel of the Post Office Department (a copy of which is annexed to the amended complaint as Exhibit A), I was advised that the complaint constituted "an expression of desire by Basic Pamphlets . . . to receive all . . . mail whether or not the Customs Bureau of the Treasury De-

partment considers it to be Communist political propaganda". The letter ended with a statement that the writer had instructed postmasters at all foreign propaganda screening points not to detain mail addressed to Basic Pamphlets or myself.

10. The last statement can only mean that my name and that of Basic Pamphlets has been placed on lists or records maintained by defendant, setting forth the names of persons who desire to receive Communist political propaganda. In the political situation which obtains at this time, such a classification carries with it a derogatory stigma. In the minds of persons into whose hands such lists come, there is inevitably an inference that persons who express a desire to receive "Communist political propaganda" are adherents of unpopular, if not unpatriotic and subversive, views.

[fol. 15] 11. The lists and records maintained by defendant are apparently not confidential, and the statute does not require that they be. The lists and records are necessarily circulated not only among postmasters at the screening units, but also to other government departments which participate in enforcing the statute. There is every reason to believe that the records are made available to other governmental agencies and congressional committees.

12. It is self-evident that mail containing expressions of political views is protected by the First Amendment to the United States Constitution. It necessarily follows, I believe, that a citizen cannot be required to place himself on a list—in effect, to register—as a condition to receiving such protected matter through the mails.

13. The implication is clear that the defendant, by deeming the institution of this action to be a request for the mailed matter, is seeking to moot the constitutional issue. I am advised that the United States Attorney has indicated that if this action is not voluntarily discontinued, he will move to dismiss the complaint. This was expressed in a letter to my attorneys dated September 13, 1963, a copy of which is annexed hereto as Exhibit 2 and made a part hereof.

14. I am advised that the defendant has sought similarly to moot two actions presently pending in District Courts in California which also are seeking to enjoin enforcement of the statute. Those actions are:

[fol. 16]

Leif Heilberg et ano. v. John F. Fixa et al.,
United States District Court, Northern District
of California, Southern Division, No. 41660.

Charles Amlin v. Leslie N. Shaw et al., United
States District Court, Southern District of Cali-
fornia, Central Division, No. 63-635 PH.

15. I am advised that a motion to dismiss the *Heilberg* action as moot was denied, and that a similar motion in the *Amlin* action is pending.

WHEREFORE, deponent respectfully prays for the convening of a three-judge court and for an order granting summary judgment to plaintiff.

/s/ CORLISS LAMONT

Sworn to before me this
28th day of November, 1963.

/s/ HENRY WINESTINE
Henry Winestine

Notary Public, State of New York.
No. 31-9702950

Qualified in New York County
Commission Expires March 30, 1964

INSTRUCTIONS

2362

July 23, 1963
(Date)

Deliver

☐ This

Publication

☐ Similar

Publication

Do not deliver

☐ This

Publication

☐ Similar

Publication

Peking Review # 12, 1963, 1 copy

| Basic Pamphlets,

| Dept. T, Box 42,

| Cathedral Station,

| New York 25, N. Y.

POB Form 2153-X, Jan. 1963

MESSAGE TO ADDRESSEE

This office is holding unsealed mail matter addressed to you from a foreign country. Under Public Law 87-793, the Secretary of the Treasury has determined this mail to be Communist political propaganda. It cannot be delivered to you unless you have subscribed to it, or otherwise want it. Please check the appropriate spaces under "Instructions" on this card and return the card. If your reply is not received by the date indicated, it will be assumed that you do not want to receive the publication(s) listed, or any similar publication. This mail will then be destroyed.

(Detach here)

Postmaster

[fol. 17]

EXHIBIT 1 TO AFFIDAVIT

[fol. 18]

EXHIBIT 2 TO AFFIDAVIT

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORKUnited States Courthouse
Foley Square
New York 7, N. Y.
10007

dww

ADDRESS REPLY TO
"UNITED STATES ATTORNEY"
AND REFER TO
INITIALS AND NUMBERERA
34264

September 13, 1963

Rabinowitz & Boudin, Esqs.
30 East 42nd Street
New York 17, N. Y.Re: Basic Pamphlets v. The Postmaster General
of the United States—63 Civ. 2422

Dear Sirs:

We have been informed that Dr. Lamont was advised by the Acting General Counsel of the Post Office Department by letter dated August 30, 1963, that instructions have been given "that any mail presently being detained be dispatched and that in the future mail addressed to Basic Pamphlets or to yourself not be detained."

In view of this, we consider the matter to be moot and respectfully suggest that you dismiss the action pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, thereby avoiding any costs.

Very truly yours,

ROBERT M. MORGENTHAU,
United States AttorneyBy /s/ EUGENE R. ANDERSON
Eugene R. Anderson,
Chief, Civil Division

[fol. 19]

ATTACHMENT TO NOTICE
IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- 63 Civ. 2422

[Title omitted]

State of New York,
County of New York, ss.:

LEONARD B. BOUDIN, being duly sworn, deposes and says:

1. I am a member of the firm of Rabinowitz & Boudin, attorneys for the plaintiff herein and submit this affidavit in support of that part of plaintiff's instant motion seeking to correct the plaintiff's name in the caption of this action, pursuant to Rule 60(a) F.R.C.P.

2. When this action was commenced, I understood Basic Pamphlets to be an unincorporated association, and pursuant to Rule 17(b), F.R.C.P. caused the papers to be prepared with Basic Pamphlets named as plaintiff. I have subsequently learned that Basic Pamphlets is the trade name of Dr. Corliss Lamont, and that there is a duly filed certificate of doing business establishing that fact in the office of the New York County Clerk.

3. It is therefore appropriate to change the designation of the plaintiff herein to "Corliss Lamont, doing business as Basic Pamphlets", simply to reflect the actual situation.

[fol. 20] WHEREFORE, deponent respectfully prays for an order correcting the caption of the summons and complaint herein to designate the plaintiff as "Corliss Lamont, doing business as Basic Pamphlets".

/s/ LEONARD B. BOUDIN
Leonard B. Boudin

Sworn to before me this
27 day of November, 1964.

/s/ HENRY WINESTINE

Henry Winestine

Notary Public, State of New York

No. 31-9702950

Qualified in New York County

Commission Expires March 30, 1964

[fol. 21]

CLERK'S NOTE

Amended complaint and attachment are omitted from the record here. They appear at side folio 1, printed page 1, *supra*.

[fol. 22]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
63 Civ. 2422

[Title omitted]

AFFIDAVIT IN OPPOSITION—Filed December 20, 1963

[fol. 23]

TYLER, ASSOCIATE GENERAL COUNSEL
POST OFFICE DEPARTMENT

I, Tyler Abell, do hereby swear to the following facts:

1. The administration of §305 of Public Law 87-793 was under my control during the first part of 1963 when I held the position of Special Assistant to the Postmaster General. In this capacity I arranged for the establishment of all the now existing Foreign Propaganda Units, and gave oral, as well as written, instructions to the Foreign Propaganda Units.
2. One of the points covered in the establishment of each Propaganda Unit was an instruction that the file kept on addressees to whom propaganda had been sent would not be made public and that no part of this file could be released to any person, U. S. government agency or other group, except with express permission from Post Office Department headquarters in Washington.
3. Although my position changed from that of Special Assistant to the Postmaster General to Associate General Counsel in May, 1963, I have continued to oversee the Communist propaganda program. There have been no

requests from any of the field offices for permission to release the above-mentioned files, nor have any instructions been given from Washington.

Tyler Abell, Associate General Counsel.

United States of America,
District of Columbia, ss.

Sworn to before me this 13th day of December, 1963.

Lawrence B. Gowen, My Commission expires April 30, 1966.

[fol. 24] Affidavit of Mailing (omitted in printing).

[fol. 25] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

63 Civ. 2422

BASIC PAMPHLETS

v.

THE POSTMASTER-GENERAL OF THE UNITED STATES.

ORDER GRANTING MOTION TO CONVENE THREE-JUDGE
COURT, ETC.—December 31, 1963

Plaintiff moves preliminarily for the convening of a three-judge court, and defendant moves to dismiss. Upon the entire record it appears that the statutory standards for convening a three-judge court pursuant to 28 U.S.C. §§ 2282 and 2284 are met, and that the arguments of defendant in support of its motion to dismiss should be presented to the three-judge court. See *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962); *Fried v. United States*, 212 F. Supp. 886, 896 (S.D.N.Y. 1963).

Accordingly, the motion to convene the three-judge court is granted, and defendant's motion to dismiss is denied, without prejudice to renewal thereof before the three-judge court.

Dated: New York, N. Y.

Wilfred Feinberg, U.S.D.J.

[fol. 26]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
63 Civ. 2422

CORLISS LAMONT d/b/a BASIC PAMPHLETS, Plaintiff,

v.

THE POSTMASTER GENERAL OF THE UNITED STATES,
Defendant.

Argued March 10, 1964

Leonard B. Boudin of Rabinowitz & Boudin, New York, N.Y. *for plaintiff.*

Robert M. Morgenthau, United States Attorney, Southern District of New York (Anthony J. D'Auria, Asst. United States Attorney on the brief), *for defendant.*

Before: Hays, Circuit Judge, Levet and Feinberg, District Judges.

OPINION—May 5, 1964

Action to enjoin the enforcement of 39 U.S.C. §4008 (Supp. IV 1959-62), for an order declaring §4008 unconstitutional and that plaintiff is entitled to receive the mail referred to in that Section without complying with the pro-

cedure prescribed therein, and for an order directing the defendant to remove plaintiff's name from all lists and records he maintains of persons desiring to receive "communist political propaganda" and not to replace plaintiff's name upon such a list. Motion by plaintiff for summary judgment and cross-motion to dismiss the complaint pursuant to Rule 12(b)(1) and (6) of the Federal Rules of [fol. 27] Civil Procedure. Defendant's motion to dismiss the complaint granted and plaintiff's motion for summary judgment denied.

Hays, Circuit Judge:

This action challenges the constitutionality of 39 U.S.C. § 4008 (Supp. IV 1959-62), added by Pub. L. 87-793, § 305(a), Oct. 11, 1962, 76 Stat. 840, which establishes a screening program for communist political propaganda originating abroad and deposited in the United States mails as unsealed mail matter. As plaintiff has requested an injunction restraining the enforcement of an Act of Congress, this court was convened pursuant to 28 U.S.C. §§ 2282, 2284, (1958).¹ Plaintiff has moved for summary judgment and defendant has cross-moved to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(1) and (6). We conclude that the plaintiff's motion should be denied and that the complaint must be dismissed.

Section 4008 requires the Postmaster General to detain all unsealed mail matter originating abroad and found to be "communist political propaganda," unless such material has been furnished pursuant to a subscription, or the addressee (upon being notified of the detention) requests delivery, or the Postmaster General otherwise ascertains the addressee's desire to receive the detained matter.² There are exceptions which include mail addressed to federal agencies, public libraries, educational institutions, and their officials and mail governed by a cultural exchange [fol. 28] agreement. To implement Section 4008 the Post Office Department and the Customs Bureau maintain eleven

screening points for the interception of communist political propaganda originating abroad. When it is determined that particular mail matter is communist political propaganda a notice (POD Form 2153-X) is sent to the addressee identifying the material being detained and advising the addressee that it will be destroyed within 20 days unless delivery is requested. Part of the form is a reply card on which the addressee may instruct the Post Office whether or not he wants the publication listed and similar publications delivered in the future. A list is kept of those requesting delivery of such material so that thereafter their mail will not be detained. 7

The facts are undisputed. Plaintiff, Corliss Lamont, is engaged in publishing and distributing pamphlets and other literature. He frequently receives both solicited and unsolicited mail from all over the world. In July 1963 Lamont was notified by the Post Office Department in San Francisco of the detention of communist political propaganda. Lamont did not reply to the notice. Instead he commenced this action to enjoin the enforcement of the statute. He alleges that Section 4008 infringes his first amendment right to freedom of speech and press and violates the due process clause of the fifth amendment by creating arbitrary and unreasonable classifications.

[fol. 29] Shortly after Lamont commenced his action the Acting General Counsel of the Post Office Department wrote to him advising him that the Postmaster General considered the filing of the complaint to constitute an expression of Lamont's desire to receive communist political propaganda mail matter and that, Lamont's wishes having thus been ascertained, his mail would not be detained in the future. Lamont thereupon amended his complaint to request an order directing that his name be removed from any list or record maintained by defendant of persons desiring to receive communist political propaganda. The amended complaint asserted that maintenance of such a list, with the inherent possibility of public disclosure, violated Lamont's first and fifth amendment rights.

Keeping in mind "the long-established principle that 'we ought not to pass on questions of constitutionality . . .

unless such adjudication is unavoidable," *Rosenberg & Fleuti*, 374 U.S. 449, 451 (1963), we proceed to an examination of defendant's claim first, that the dispute is moot since the Postmaster General has ordered that Lamont's mail not be detained in the future, and second, that Lamont has made no sufficient showing of a threat of injury by reason of the listing of his name.

1. Mootness

Lamont's first claim rests on the assertion that his freedom to read, a freedom he finds in the first amendment guaranty of freedom of speech and press, is infringed by the deterrent effect of the requirement that he request [fol. 30] delivery of communist political propaganda. But that requirement is no longer applicable to him since defendant has ordered the unimpeded delivery of plaintiff's mail. And, setting aside for the moment his objection to being included in defendant's list, Lamont does not contend that his rights are being violated by the statute as presently applied.

When the relief sought, here the unimpeded delivery of mail, is obtained in some other manner prior to final judicial disposition, the controversy becomes moot and the court ceases to have jurisdiction. *Taylor v. McElroy*, 360 U.S. 709 (1959); *Atherton Mills v. Johnston*, 259 U.S. 13 (1922). The same principle applies even when challenged governmental action continues to affect the complainant if no objection is raised to the changed manner of its incidence. *Natural Milk Ass'n v. San Francisco*, 317 U.S. 423 (1943). See generally Diamond, *Federal Jurisdiction To Decide Moot Cases*, 94 Pa. L. Rev. 125, 133-35 (1946).

Lamont argues that a defendant cannot moot a controversy in which the public interest is involved by the expedient of ceasing to apply a statute once a court challenge has been instituted. He contends that the Government has attempted to render this action moot as part of a policy of avoiding an adjudication of the statute's validity, that the persons whose freedom is most curtailed by the statute are those too timorous to protest, and that there is consequently a public interest in permitting plain-

tiff to continue his action so as to obtain an adjudication on behalf of these other persons.

[fol. 31] The cases upon which Lamont relies, e.g., *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953), *Walling v. Helmerich & Payfer, Inc.*, 323 U.S. 37, 43 (1944); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 516 (1911), do not support his thesis. The public interest involved in those cases was that of enforcement by the Government of a regulatory statute. The cases hold that voluntary cessation of allegedly illegal conduct will not render the cause moot where the defendant is able at any time to recommence the illegal conduct. If there is no likelihood of a return to the old ways, the controversy will be moot even though the public interest is involved.

"The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . . For to say the case has become moot means that the defendant is entitled to a dismissal as a matter of right. . . . The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.'"

United States v. W.T. Grant Co., supra at 632-33. (Footnotes omitted; emphasis added).

It is not contended here that the Postmaster General is likely to resume detention of Lamont's mail. Nor could it be. This is not a case where abandonment by a defendant of a prior course of conduct is to be explained by a change in attitude which may prove transient. Here the Postmaster General's actions have at all times been consistent with the mandate of the statute. The statute has been enforced both [fol. 32] before and after the initiation of this action. Lamont, by his own move, has changed the manner of enforcement as to him.

Moreover Lamont does not seek here to enforce a regulatory statute. He asked us to hold a statute invalid under

the constitution. We know of no instance where the Supreme Court in rejecting a claim of mootness has announced a "public interest" in the adjudication of a constitutional issue. Our tradition of judicial reluctance to decide constitutional questions in advance of strictest necessity, see *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)—and particularly the line of decisions holding that a litigant who invokes the power to annul legislation on grounds of its unconstitutionality "must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement," *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923); see *Poe v. Ullman*, 367 U.S. 497, 502-09 (1961) (opinion of Frankfurter, J.); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 70-81 (1961); Comment, *Threat of Enforcement—Prerequisite of a Justiciable Controversy*, 62 Colum: L. Rev. 106 (1962)—dictates the conclusion that in cases such as this the public interest requires an exacting application of the standards governing mootness claims. See *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 184 (1948).

Lamont's suggestion that he be permitted to represent the interests of nonparties subject to the statute does not [fol. 33] affect our analysis of the public interest as it relates to the mootness of Lamont's first claim. Although it not infrequently happens that a party to constitutional litigation is representative of a class (e.g., taxpayers, parents), a determination of mootness will nevertheless be made on the basis of the factual circumstances applicable to the party himself, not to the class. See *Doremus v. Board of Educ.*, 342 U.S. 429, 432 (1952). We postpone until after our discussion of the problem posed by the second part of Lamont's complaint, consideration of his contention that, despite the absence of any controversy between him and the Postmaster General, he should nevertheless be permitted to sue as the representative of others similarly situated.

2. *Timeliness of the Second Claim.*

Lamont requests an order directing that defendant remove his name from lists and records of persons desiring to receive communist political propaganda.

Viewed separately, this part of the complaint does not state an actual controversy, for there is no allegation that Lamont has demanded the requested relief from the defendant or that it has or would be refused. But of course this issue cannot be so simply resolved, since defendant's acquiescence in such a demand would subject Lamont's mail to renewed detention thus reviving that aspect of the controversy. In substance, then, the complaint must be regarded not as asserting two separate claims, but as stating a single claim with alternative allegations of injury. Either plaintiff's mail is detained *or* he is listed as a person desir- [fol. 34] ing to receive communist political propaganda. We held above that the controversy was moot insofar as it rested on an allegation of injury stemming from detention of plaintiff's mail. We now consider Lamont's contention that inclusion in a list of persons desiring to receive communist political propaganda is a sufficient showing of injury to permit him to challenge the statute as a whole.

Lamont maintains that he is injured in two respects: (1) that the mere fact of inclusion in a list circulated to Post Office personnel infringes his right of anonymity, and (2) that the list will be distributed to other government agencies, including Congressional investigating committees, and eventually to the general public. Both effects are said to deter him from the free exercise of his rights of speech and association.

The statute makes no provision whatsoever for keeping any list or record of persons desiring to receive communist political propaganda. Lamont assumes, presumably correctly, that such a list is kept since the agents of the Postmaster General would not otherwise be able to ascertain what persons are to get the mail in the regular course. But if any injury results from the keeping of such a list it is an injury which is purely incidental to the statutory scheme and one which appears to be wholly unintended.

It is not sufficient for a litigant merely to assert that particular government action or the threat of such action deters him from the exercise of some constitutional right. The claimed deterrent effect must be grounded in a realistic [fol. 35] appraisal of the impact of the action being challenged. *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (opinion of Frankfurter, J.). And when the claim of injury is based upon the prospect of future action, the threat of such action must be imminent and not hypothetical or imagined. *Poe v. Ullman*, supra; *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 71-81 (1961).

Thus, in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951), cited by Lamont, the complainants alleged both that they had been falsely classified as communist organizations and that such classification had resulted in substantial economic injury. 341 U.S. at 137, 158-59. Though these allegations, which were deemed admitted by the Attorney General, were held to establish the existence of a justiciable controversy, the Court treated the question of justiciability as a problem of substantial difficulty.

By contrast Lamont does not indicate that the present circulation of the list to government personnel or any future distribution that may occur will result in any material injury, such as loss of customers or social ostracism. Lamont does contend, in a conclusionary fashion, that future public disclosure of the list would lead to public opprobrium. It is not immediately apparent why this should be so. Classification as a person desiring to receive communist political propaganda—as distinguished from, for example, classification as a “communist front organization”—need not connote disapprobation. Indeed, the statutory exception for public libraries and for educational institutions and their officials, evidences Congressional recognition that reputable organizations and individuals may receive communist political propaganda without any disgrace attaching.

In any event, the threat of general distribution of the list is largely speculative. Lamont cites statements in Congressional hearings indicating that under the previous foreign propaganda screening program it was the practice of the Post Office to disclose to Congressional committees the

names of recipients of communist propaganda. See Hearings before the House Committee on Un-American Activities, 85th Cong., 2d Sess., Sept. 3, 4 and 5, 1958, at p. 2794; cf. Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act, etc., of the Senate Committee of the Judiciary, 87th Cong., 1st Sess., Mar. 26, 1959 and April 3, 1961, at p. 56 (bulk shipments to distributors). But that program, which was initiated without specific statutory authorization and was discontinued by Executive Order on March 17, 1961, nineteen months before enactment of the present statute, differed in several important respects from the present program. See generally, Schwartz and Paul, *Foreign Communist Propaganda in the Mails: A report on Some Problems of Federal Censorship*, 107 U. Pa. L. Rev. 621, 633-49 (1959). In view of the change in administration and the material differences between the two programs, which may well be taken to manifest a basic change in administrative philosophy, we would not be disposed to lightly assume that administrative policy regarding disclosure of lists of recipients of communist propaganda has remained constant. [fol. 37] In support of the conclusion that administrative policy has indeed changed the Government submits an affidavit by Tyler Abell, Associate General Counsel to the Post Office Department, which states that the list kept of addressees to whom communist propaganda will be sent without detention will not be made public and that instructions have been issued prohibiting any part of the list from being released to any person, United States Government agency or other group without the express permission of the Post Office Department. As Lamont points out, this affidavit does not establish conclusively that disclosure will not occur, since it does not specify under what circumstances permission might be given for the list's release. But it does evidence a solicitous regard for the confidentiality of this information, and we think that on the whole this affidavit suffices to deprive the prior administrative practice cited by Lamont of whatever probative value it may have had. In this posture of the case, we can only conclude that public disclosure is only an abstract possibility, not an immediate threat.

We hold that present circulation of the list to Post Office personnel does not constitute such a legal injury as will permit plaintiff to maintain this suit, and that the threat of future public distribution of the list is not sufficiently imminent to present a controversy ripe for adjudication.

[fol. 38]

3. Standing to assert the rights of third parties.

Lamont contends that even if this court should find that there is no justiciable controversy between him and the Postmaster General, he should nevertheless be permitted to continue this action "in order to vindicate the rights of the many persons who are not willing or able to sue but who, like the plaintiff, have been and will be injured by this enforcement of the statute." Lamont asserts that the Government's policy for administering this statute is deliberately designed to insulate it from judicial scrutiny, and that the rights of numerous individuals who are unwilling to bring suit or request delivery of detained mail matter are being abridged and will continue to be abridged if this action is dismissed. That assertion is neither admitted nor denied by the Government in this case.⁵

As a general rule litigants may not invoke the rights of parties not before the court.

"Nor can respondents vindicate any general interest which the public may have in the construction of the Act by the Secretary and which must be left to the political process. Respondents, to have a standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law."

Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940); accord, *Tileston v. Ullman*, 318 U.S. 44 (1943) (fourteenth amendment claim). Although numerous exceptions have been made to the doctrine that a litigant may not assert the rights of third parties, see, e.g., *NAACP v. Alabama*, 357 U.S. 449, 459 (1958) (right of anonymity may be asserted [fol. 39] by association on behalf of its members); *Pierce*

v. *Society of Sisters*, 268 U.S. 510, 534-36 (1925) (private school may assert rights of the parents of its pupils), in no case has such an exception been created when, as here, the litigant failed to demonstrate that he is, in his own right, an injured party. See Sedler, *Standing To Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599, at 630 n. 129, 646 (1962). And in general there has been some pre-existing relationship between the complainant and the person whose rights he seeks to assert other than the fact that both are affected by the challenged statute. See Sedler, *supra* at 641-45, 647.

The present case does not fit within any of the established exceptions, and we hold that Lambont has no standing to invoke the rights of persons not parties to this action.

Defendant's motion to dismiss the complaint is granted, and plaintiff's motion for summary judgment is denied.

Settle order on notice.

Paul R. Hays.

[fol. 40]

¹ In *Amlin v. Shaw*, No. 63-635-PH, S.D. Cal., Feb. 13, 1964, a complaint challenging section 4008 was dismissed by a single judge, who held that it failed to present either a justiciable controversy or a substantial constitutional question. The complaint in the present case, however, was found by Judge Feinberg, to whom the case was originally assigned, to present a substantial question both on the merits and on the issue of justiciability. Accordingly, he requested the convocation of this court. See *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962). Defendant's renewed motion challenging the convocation of the three-judge court is denied.

² The statute, 39 U.S.C. 4008, reads as follows:

"§4008. Communist political propaganda

(a) Mail matter, except sealed letters, which originates, or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be 'communist' political propaganda, shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not

be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

(b) For the purposes of this section, the term 'communist political propaganda' means political propaganda, as defined in section 1(j) of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611(j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951 or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended.

[fol. 41]

(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material whether or not 'communist political propaganda' addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government mails an equal amount of material for delivery in any country described in subsection (b)."

Section 1(j) of the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. 611(j), whose definition of "Communist political propaganda" is incorporated in Section 4008 provides:

"(j) The term 'political propaganda' includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence. • • •"

³ Lamont's complaint alleges that the statute is unconstitutional and void upon its face and as applied because:

[fol. 42]

"a. it violates plaintiff's right to freedom of speech and press as guaranteed by the First Amendment to the United States Constitution;

"b. it violates the due process clause of the Fifth Amendment to the United States Constitution in that it is vague, indefinite and uncertain and fails to provide adequate or any procedural safeguards for making the determination as to what is 'Communist political propaganda', assuming such a determination can ever be made;

"c. it violates the due process clause of the Fifth Amendment to the United States Constitution by creating an arbitrary and unreasonable classification, to wit: persons desiring to receive Communist political propaganda, and implicitly stigmatizing members of that class and holding them up to opprobrium;

"d. it violates the due process clause of the Fifth Amendment to the United States Constitution by creating an arbitrary and unreasonable classification, to wit: officials of United States Government agencies, public libraries, colleges, universities, graduate schools and scientific or professional institutions for advanced studies, which class is exempt from the provision of the statute, with the result that persons in the position of plaintiff are discriminated against."

⁴ See note 2 supra.

⁵ It should be noted, however, that a suit challenging section 4008 might be brought by a sender of detained material, e.g. a distributor of Russian books or magazines. Cf. amended complaint in *McReynolds v. Christenberry*, Civil No. 63-3648, S.D.N.Y., filed March 30, 1964. It would not appear that such a suit could be mooted by any administrative action, and it would equally serve to secure full protection of the rights of recipients. Indeed, past challenges to statutes regulating the use of the mails, have, almost without exception, been advanced by senders, whose interest is usually more direct than that of a recipient—at least when, as here, the mail matter involved is unsealed, unsolicited, mail. See, e.g., *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946); *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407 (1921).

[fol. 43]

 LAMONT,

v.

 POSTMASTER GENERAL.

I concur.

4/28/64 RHL

 [fol. 44] FEINBERG, District Judge (dissenting)

As the majority opinion correctly points out, while Section 4008 does not specifically authorize the Post Office to maintain a list of persons desiring to receive communist political propaganda, such a list is essential to effective implementation of the statutory scheme. Plaintiff, therefore, is in a position to challenge the constitutionality of the statute, even though his mail will not be detained in the future, if he has suffered, or is imminently threatened with, a legal injury as a result of the presence of his name on the list. The majority concludes as a matter of law that public disclosure of the list "is only an abstract possibility, not an immediate threat." It refers to the prior Post Office practice of disclosing the names on such a list to Congressional committees, but relies upon an affidavit of the Associate General Counsel of the Post Office as depriving that prior practice cited by plaintiff "of whatever probative value it may have had." This conflict on a crucial point raises a genuine issue as to a material fact—likelihood of public disclosure of the list—requiring denial of the government's motion, whether it be treated as a motion to dismiss or as one for summary judgment. *Cf.* Rule 12(b), Fed. R. Civ. P.

[fol. 45] The majority also finds that "... Lamont does not indicate that the present circulation of the list to government personnel or any future distribution that may occur will result in any material injury, such as loss of customers or social ostracism," and concludes that "classification as a person desiring to receive communist political propaganda ... need not connote disapprobation." It may

be doubted whether one asserting the justiciability of a constitutional right to anonymity need show more in the way of injury than a threat of public disclosure, *cf. Talley v. California*, 362 U.S. 60 (1960); *United States v. Rumely*, 345 U.S. 41, 57 (1953) (concurring opinion), or, perhaps, more than the limited disclosure to Post Office personnel concededly present here.¹ But, in any event, whether classification as a person desiring to receive communist political propaganda need connote public disapprobation is irrelevant, since it ordinarily does so connote, and social ostracism flows from this. *Cf. Grant v. Reader's Digest Ass'n*, 151 F.2d 733, 735 (2 Cir.), cert. denied, 326 U.S. 797 (1946).

Therefore, I dissent from the grant of the government's motion. In addition, were I to follow the lead of the majority in making a finding as to this issue on this record, I [fol. 46] would be inclined to conclude that there is a sufficient threat of injury to satisfy the requirement of "ripeness." This conclusion would be predicated largely on the irreparable nature of the threatened injury and the improbability of plaintiff having sufficient notice of public disclosure of the list to allow him to raise his constitutional objections before the injury is inflicted.

In addition, the majority opinion concedes that there are numerous exceptions to the doctrine that a litigant may not assert the constitutional rights of third parties. It concludes that this case is not appropriate for invoking one of the exceptions because plaintiff has failed to demonstrate that he is, in his own right, an injured party. However, if the conclusion as to ripeness with regard to the list is incorrect (as I think it is), then the rights of third parties who themselves might be afraid to bring suit are significant. Thus, one of the arguments advanced against Section 4008 is that the standard of "communist political propaganda" is so vague that it could include relatively inoffensive publications.² Yet, one who would make this argument in test-

¹ *Cf. Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139-41 (1941) (characterizing the listing challenged there as defamatory); *RESTATEMENT, TORTS* § 577 (publication rule in defamation cases).

² *Cf. Douglas, The Right of Association*, 63 Colum. L. Rev. 1361, 1372 (1963).

ing the constitutionality of Section 4008 must either announce an interest in communist political propaganda and invite social disapprobation or forego the mail affected by the Section. Allowing plaintiff in this suit to raise the rights of third parties would extricate them from this dilemma. Note, 77 Harv. L. Rev. 1165, 1170 (1964).

[fol. 47]. There is another factor here which may not of itself furnish sufficient basis for denying the government's action but which warrants comment. This is one of several actions brought to test the constitutionality of Section 4008 by a recipient whose mail has been withheld. In each case, after the complaint had been served, the Postmaster General delivered such mail to the plaintiff and then asked the court to dismiss the action as moot.² With commendable candor, the government admits that this device, if approved by the courts, will prevent any potential recipient of such mail from testing the statute.³ I doubt whether the doctrine of mootness or justiciability requires this result, cf. *Mechling Barge Lines v. United States*, 368 U.S. 324, 331-36 (1961) (dissenting opinion), particularly where a First Amendment right is allegedly involved.

This dissent is not to be taken as expressing any opinion as to the constitutionality of Section 4008, since the majority opinion does not reach these issues, and it would, therefore, be inappropriate for me to do so.

May 5, 1964

Wilfred Feinberg, U. S. D. J.

² In addition to the instant case, complaints were filed in the Northern District of California (*Heilberg v. Firia*, No. 41660, N.D. Cal.) and the Southern District of California (*Amlin v. Shaw*, No. 63-635-PH, S.D. Cal.). It appears that the government's position in both cases was as stated in the text. See Transcript of hearing in the *Heilberg* case, dated October 24, 1963, p. 5; Judgment of Dismissal in the *Amlin* case, dated February 13, 1964, on the ground, *inter alia*, that there is no justiciable case or controversy.

³ Transcript of oral argument, pp. 61-62.

[fol. 48]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civ. 2422

[Title omitted]

NOTICE OF SETTLEMENT—Filed May 19, 1964

Sir:

Please Take Notice that the within Order will be presented for settlement and signature to the Honorable Paul R. Hays, United States Circuit Judge, the Honorable Richard H. Levet, United States District Judge and the Honorable Wilfred Feinberg, United States District Judge, at the office of the Clerk, Room 601, United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 18th day of May, 1964, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated: New York, New York, May 11, 1964:

Yours etc.,

Robert M. Morgenthau, United States Attorney for
the Southern District of New York, Attorney for
Defendant.

To: Rabinowitz & Boudin, 30 East 42nd Street, New
York, New York 10017, Attorneys for Plaintiff.

[fol. 49]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civ. 2422

CORLISS LAMONT d/b/a BASIC PAMPHLETS, Plaintiff,

—v.—

THE POSTMASTER GENERAL OF THE UNITED STATES,
Defendant.

ORDER AND JUDGMENT—May 19, 1964

The complaint herein having been filed on August 13, 1963 and the amended complaint having been filed on December 3, 1963 and the plaintiff having made application to this Court (Wilfred Feinberg, United States District Judge, sitting) for the convocation of a three-judge court and the defendant having opposed said application and having moved to dismiss the amended complaint and Judge Feinberg having granted plaintiff's application and having denied defendant's motion and a three-judge court having been convened consisting of Paul R. Hays, U.S.C.J.; Richard H. Levett, U.S.D.J.; and Wilfred Feinberg, U.S.D.J. and the plaintiff having moved before the three-judge court (a) for summary judgment, (b) to amend the caption to read as set forth above and (3) to have the matter proceed and be decided upon the amended complaint and the defendant having consented to amending the caption and to proceeding upon the amended complaint and the defendant having moved before the three-judge court to dismiss the amended complaint and having renewed the objection to the convocation of the three-judge court and the matter having come on to be heard before [fol. 50] the three-judge court and the court having filed its written opinions, it is hereby,

Ordered, Adjudged and Decreed, that the plaintiff's motion for summary judgment be and the same hereby is denied, and it is further,

Ordered, Adjudged and Decreed, that the caption of this matter be and the same hereby is amended to read as set forth above, and it is further,

Ordered, Adjudged and Decreed, that this matter proceed and be decided upon the amended complaint, and it is further,

Ordered, Adjudged and Decreed, that the amended complaint be and the same hereby is dismissed with prejudice, and it is further,

Ordered, Adjudged and Decreed, that the defendant's objection to the convocation of the three-judge court be and the same hereby is overruled.

Dated: New York, New York, May 19th, 1964.

Paul R. Hays, U. S. C. J.
Richard H. Levet, U. S. D. J.

I dissent from so much of the foregoing order as grants defendant's motion to dismiss the amended complaint and in view of the action of the majority do not reach the plaintiff's motion for summary judgment.

Wilfred Feinberg, U. S. D. J.

Dated: May 19, 1964.

Judgment Entered, 5/19/64, James E. Valeche, Clerk.

[fol. 51] Affidavit of Mailing (omitted in printing).

[fol. 52]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Index No. 63 Civ. 2422

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed June 17, 1964

I. Notice is hereby given that Corliss Lamont, doing business as Basic Pamphlets, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the judgment denying plaintiff's motion for summary judgment and for a permanent injunction, and granting defendant's motion to dismiss the amended complaint with prejudice, which judgment was entered on May 19, 1964.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. This notice of appeal.
2. The order and judgment entered May 19, 1964.
3. The opinions of the three-judge court dated May 5, 1964.
4. The amended complaint.
5. The notice of motion for summary judgment and other relief, dated November 29, 1963.
6. The statement pursuant to Rule 9(g) of the General Rules of the District Court for the Southern District of New York.

[fol. 53] 7. The affidavit of Corliss Lamont, sworn to November 28, 1963.

8. The affidavit of Leonard B. Boudin, sworn to November 27, 1963.
9. The affidavit of Tyler Abell, sworn to December 13, 1963.

III. The following questions are presented by this appeal:

1. Whether plaintiff's claim that 39 U.S.C. § 4008 is unconstitutional is moot.

2. Whether the defendant's detention of mail, and his maintenance of lists of persons, including plaintiff, who desire to receive "Communist political propaganda" through the mails, and the possibility of such lists being disclosed to other persons, constitute a violation of the constitutional rights of plaintiff.

3. Whether plaintiff has standing in this action to assert the unconstitutionality of 39 U.S.C. § 4008 on behalf of other persons affected by it.

4. Whether 39 U.S.C. § 4008 as written and applied herein is constitutional.

Dated: June 16, 1964.

Rabinowitz & Boudin, By Leonard B. Boudin, Member of the Firm, Attorneys for Plaintiff-Appellant.

[fol. 54] Proof of Service (omitted in printing).

[fol. 55] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 56]

SUPREME COURT OF THE UNITED STATES

No. 491—October term, 1964

CORLISS LAMONT, doing business as BASIC PAMPHLETS,
Appellant,

—v.—

POSTMASTER GENERAL OF THE UNITED STATES.

Appeal from the United States District Court for the
Southern District of New York.

ORDER NOTING PROBABLE JURISDICTION—December 7, 1964

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. Counsel are directed to discuss in their briefs and oral argument the question of mootness as well as the merits of the case.

Mr. Justice White took no part in the consideration or decision of this case.

FILE COPY

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FILED

SEP 12 1964

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

October Term, 1964

No. **491**

CORLISS LAMONT, doing business as
BASIC PAMPHLETS,

Appellant,

v.

THE POSTMASTER GENERAL OF THE
UNITED STATES.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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HENRY WINESTINE.

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IN THE
Supreme Court of the United States

October Term, 1964

No.

CORLISS LAMONT, doing business as BASIC PAMPHLETS,
Appellant,

v.

THE POSTMASTER GENERAL OF THE UNITED STATES.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Corliss Lamont, doing business as Basic Pamphlets, the appellant, having appealed from the order and judgment dated May 19, 1964 of the three-judge court of the United States District Court for the Southern District of New York, which denied appellant's motion for summary judgment and granted the motion of the Postmaster General to dismiss the amended complaint, submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinions below (R. 7; Appendix A, *infra*), are reported at 229 F. Supp. 913.

Jurisdiction

Appellant brought this action in the United States District Court for the Southern District of New York for a judgment enjoining the Postmaster General from enforcing Section 305 of the Postal Service and Federal Employees Salary Act of 1962, Public Law 87-793, § 305, Oct. 11, 1962, 76 Stat. 840, 39 U. S. C. § 4008 (hereinafter called "the statute"), on the ground that it is unconstitutional, and directing him to remove appellant's name from lists and records maintained by him of persons desiring to receive "Communist political propaganda", and for a declaratory judgment that the said statute is unconstitutional.

The action was brought under Article III, § 2, of the United States Constitution; 28 U. S. C. §§ 1331, 1339, 1356, 2201-2202, 2282 and 2284; and § 10 of the Administrative Procedure Act, 5 U. S. C. § 1009.

The judgment below was made and entered May 19, 1964 (R. 5, Appendix B, *infra*). The notice of appeal was filed June 17, 1964 (R. 1). Appellant's time to file this statement was extended to September 16, 1964 by order dated August 10, 1964 of the Court below.

Jurisdiction of this appeal is conferred by 28 U. S. C. § 1253. The following cases sustain the Court's jurisdiction: *Schneider v. Rusk*, 372 U. S. 224; *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U. S. 713; *Florida Lime Growers v. Jacobsen*, 362 U. S. 73.

Statutes Involved

The principal statute involved is Section 305 of the Postal Service and Public Employees Salary Act of 1962, Public Law 87-793, § 305, October 11, 1962, 76 Stat. 840, 39 U. S. C. § 4008, which provides:

"4008. Communist political propaganda

(a) Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be 'communist political propaganda', shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

(b) For the purposes of this section, the term 'communist political propaganda' means political propaganda, as defined in section 1(j) of the Foreign Agents Registration Act of 1938, as amended (22 U. S. C. 611(j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951 or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended.

(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material whether or not 'communist political propaganda' addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government mails an equal

amount of material for delivery in any country described in subsection (b)."

Section 1(j) of the Foreign Agents Registration Act of 1938, 22 U. S. C. 611(j), whose definition of political propaganda is incorporated in 39 U. S. C. § 4008, provides as follows:

"(j) The term 'political propaganda' includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, covert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence.
• • •"

Questions Presented

1. Whether 39 U. S. C. § 4008 on its face and as applied is unconstitutional because it impairs freedom of speech under the First Amendment, sanctions an unlawful search and seizure under the Fourth Amendment, constitutes a bill of attainder, and denies due process and equal protection under the Fifth Amendment to the Constitution.
2. Whether the case is justiciable where as the result of the institution of the lawsuit the Postmaster General

has ceased detaining appellant's mail, but the statute is enforced by listing appellant as a person requesting "communist political propaganda", with the danger of public disclosure of such lists continuing, and by the detention and destruction of mail addressed to all other persons whose desire for anonymity precludes similar suits.

Statement of the Case

Appellant is engaged in the business of publishing and distributing pamphlets and other literature on subjects of public interest (R. 29, 40).

In July 1963 appellant received a notice from the Post Office Department in San Francisco, California, that mail addressed to appellant, consisting of "Peking Review #12, 1963, 1 copy" was being detained as "Communist political propaganda", pursuant to the statute. The notice advised appellant that unless a specific request was received for the mail, it would be destroyed (R. 40, 44).

Without responding to the notice, appellant commenced this action. Thereupon, the Acting General Counsel of the Post Office Department wrote to appellant, stating that the commencement of the action was deemed to be an expression of appellant's desire to receive such mail, and that postmasters at all propaganda screening points were being instructed not to detain appellant's mail (R. 31, 34, 41).

Appellant then served the amended complaint in which he sought a preliminary and permanent injunction enjoining the carrying out or enforcement of the statute and directing the removal of appellant's name from all lists and records, kept by the Postmaster General, of persons desiring to receive "communist political propaganda", and a declaratory judgment that appellant is entitled to receive mail without complying with the statute, and that the statute is unconstitutional (R. 29, 34).

Appellant moved, prior to service of an answer, for the convening of a three-judge court and for summary judgment (R. 35). A statutory court was convened. It denied, one judge dissenting, appellant's motion for summary judgment and dismissed the amended complaint (R. 5-6).

The majority held that the issues were moot, because appellant's mail was no longer being detained; that the maintaining of appellant's name on lists of persons desiring Communist political propaganda did not present a question ripe for determination in the absence of disclosure; and that appellant had no standing to challenge the statute on behalf of other persons. The dissenting opinion of District Judge Feinberg concluded that appellant's claim was ripe in view of the possibility of disclosure and the probable lack of opportunity to raise the issue before the injury occurred. The dissent also reasoned that appellant should be permitted to challenge the statute on behalf of other persons. Judge Feinberg questioned the appellee's policy of "mooting" all actions attacking the statute, particularly since First Amendment rights are involved.

The Questions Are Substantial

• 1. The statute is unconstitutional upon its face and as applied under the First Amendment's prohibition against government abridgement of freedom of speech. 39 U. S. C. § 4008 explicitly authorizes the Postmaster General to detain reading materials determined by him *ex parte* to be "communist political propaganda" and to destroy these materials unless the addressee affirmatively requests delivery. "Communist political propaganda" includes matters relating to "the political or public interests, policies, or relations of a government of a foreign country or a foreign political party * * * the foreign policies of the United States [and] racial, religious or social dissensions". See 22 U. S. C. 611(j). This detention, delay, and destruc-

tion of literature on important public issues is a direct interference with the citizen's right under the First Amendment "to receive" such literature. *Martin v. City of Struthers*, 319 U. S. 141, 143; *Grosjean v. American Press Co.*, 297 U. S. 233. The use of a licensing technique necessarily curtails the dissemination of reading matter. "So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a [registration] restriction". *Thomas v. Collins*, 323 U. S. 516, 540.

Further, to require the recipient of such mail to expressly request it, and to have his name placed upon a list of persons desiring "communist political propaganda" is both to establish a blacklist (See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 144, concurring opinion of Mr. Justice Black) approaching a bill of attainder, and to violate the right to political anonymity protected under the First Amendment. *Talley v. California*, 362 U. S. 60; *N.A.A.C.P. v. Alabama*, 357 U. S. 449; *Bates v. City of Little Rock*, 361 U. S. 516; *Shelton v. Tucker*, 364 U. S. 479; Comment, *The Constitutional Right to Anonymity*, 70 Yale L. J. 1084. Of all persons entitled to anonymity, certainly the passive recipient of matter containing political opinion should receive the greatest protection. He has "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men". *Olmstead v. United States*, 277 U. S. 438, 478 (dissenting opinion).

The statute, as applied, also threatens disclosure to the public of the recipient's name, with recognized invidious consequences. This is the result of the "close relationship between the Un-American Activities Committee and enforcement officials". Schwartz and Paul, *Foreign Communist Propaganda in the Mails*, 107 U. of Pa. L. Rev. 621, 631. The names and addresses of persons receiving so-called communist propaganda have been turned over to

congressional investigating committees and disseminated publicly.*

The appellee's assertion that the lists will not be disclosed except with "permission from Post Office Department Headquarters in Washington" (R. 56) hardly establishes the "solicitous regard for the confidentiality of this information", referred to by the Court below (*infra*, 13a). In the light of past disclosure, it can only be read as evidencing a continuation of the policy of routine disclosure. In any event, on the appellee's motion to dismiss, the complaint's allegations of disclosure (R. 31) must be deemed true.

A democratic society cannot flourish if communication of ideas is discouraged. *Grosjean v. American Press Co.*, 297 U. S. 233, 247, 250. If the Congress may thus burden political opinion mailed from some countries, it may extend the restriction to all countries, to domestic mail, and to all opinion antagonistic to current governmental policy. The mails may not be so manipulated. See Justices Brandeis and Holmes dissenting in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407, 430-431, 437; *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 156, 158, and Mr. Justice Harlan's statement in *Roth v. United States*, 354 U. S. 476 at 504, n. 3 (dissent).

Direct restraints on the exercise of First Amendment rights are unconstitutional in the absence of a clear and present danger, *Schenk v. United States*, 249 U. S. 47, 52; *Whitney v. People of State of California*, 274 U. S. 357, 372

* Hearings, House Committee on Un-American Activities, 85th Cong. 2d Sess., Sept. 3, 4 and 5, 1958, at p. 2794. See also Hearings, House Committee on Un-American Activities, Dec. 10 and 11, 1956, p. 6057; *id.*, June 11 and 12, 1958, p. 2433; *id.*, July 29, 30 and 31, 1958, p. 2641; *id.*, Sept. 3, 4 and 5, 1959, p. 283. See also Hearings before the Senate Subcommittee to Investigate the Administration of the Internal Security Act, 87th Cong. 1st Sess., p. 56.

(Brandeis, J. concurring opinion); *Near v. Minnesota*, 283 U. S. 697; *DeJonge v. Oregon*, 299 U. S. 353; *Thomas v. Collins*, 323 U. S. 516, 530. Literature within the statutory definition here presents no danger at all, clear and present, or vague and remote, warranting the direct infringement on the citizen's freedom to read what he wishes. If it did present a substantial danger, the matter would be non-mailable under 18 U. S. C. § 1717, which makes criminal the mailing of matter advocating treason, insurrection, or forcible resistance to any law of the United States. The Government has not suggested that this section is applicable to the mail involved in this case.

2. This case also raises in four distinct ways substantial problems under the due process clause of the Fifth Amendment:

(a) The statute is unconstitutionally vague because it grants to the Secretary of the Treasury unlimited administrative discretion to determine what is "communist political propaganda". Cf. *Marcus v. Property Search Warrants*, 367 U. S. 717. That term, which incorporates by reference the definition in Section 1(j) of the Foreign Agents' Registration Act, 22 U. S. C. 611(j), is unconstitutionally vague under this Court's recent decisions in cases touching on freedom of speech, *Cramp v. Board of Public Instruction*, 368 U. S. 278; *Baggett v. Bullitt*, 377 U. S. 360.

(b) The statute denies procedural due process because it establishes no safeguards as to the manner in which the Secretary of the Treasury determines what literature is within the statutory definition of "communist political propaganda". There is no notice, no charges, no hearing and no appeal. Plainly, this is impermissible practice under the Constitution. See *Morgan v. United States*, 304 U. S. 1, 18; *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 302-304; *Lloyd Sabauo v. Elting*, 287 U. S. 329, 335-336; *United States v. Abilene & S. Ry. Co.*, 265 U. S. 274, 288-289.

(c) The statute, in restricting so broad a category of information as "communist political propaganda", serves no reasonable legislative purpose and so violates the right to substantive due process protected by the Fifth Amendment. It seems impossible to attribute to the statute any reasonable purpose permissible under the First Amendment.

(d) Finally, the statute denies equal protection under the Fifth Amendment by exempting from the detention procedure "any United States Government agency, or any public library, or . . . any college, university, graduate school, or scientific or professional institution for advanced studies or any official thereof". There is no justification for exempting any of the named categories, while discriminating against a publisher such as appellant or against the ordinary citizen. The citizen's right to be informed is as great, if not greater, than that of any other group. Such arbitrary and unreasonable classifications violate the Fifth Amendment, *Bolling v. Sharpe*, 347 U. S. 497.

3. Lastly, the examination, even of unsealed mail, to determine its political content is a violation of the search and seizure clause of the Fourth Amendment, *Ex parte Jackson*, 96 U. S. 727, 733; *Oliver v. United States*, 239 F. 2d 818 (8th Cir.), cert. dismissed, 353 U. S. 952; *Marcus v. Property Search Warrant*, 367 U. S. 717, 724, 729; *Olmstead v. United States*, 277 U. S. 438, 471 (dissenting opinion). The statute, without precedent in American history, deals with private mail coming to the home, not with the public utterances in the streets and the parks. See *Cantwell v. State of Conn.*, 310 U. S. 296, 303. It is comparable to a physical invasion of the home. Cf. *Silverman v. United States*, 365 U. S. 505. This is, in fact, a variant of the writs of assistance which the framers of the Fourth Amendment sought to preclude, *Boyd v. United States*, 116 U. S. 616; see also *Entick v. Carrington*, 19 How. St. Tr. 1029.

4. The District Court erred in holding that the cause was moot because the Postmaster General ceased detaining appellant's mail following the institution of this lawsuit. In the first place, despite the Postmaster General's cessation of interference with appellant's mail, the statute continues to be enforced against appellant, who remains classified on at least eleven official Post Office lists (R. 56) as a person desiring such "propaganda" and whose name is available as such to congressional committees for their files and for public disclosure (R. 31, 42). This conceded listing is a justiciable injury, *Joint Anti-Fascist Refugee Committee v. McGrath*, *supra*; the listing and danger of disclosure, quite aside from the possible future detention of appellant's mail, show that the appellant's challenge is not moot even by the restrictive standards of the Government and the court below.

But, in fact, the mootness rule is not as rigid as the Government suggests. There can be no mootness where a continuing public interest requires a determination of issues, despite the apparent cessation of the illegal conduct (*Walling v. Helmerich & Payne, Inc.*, 323 U. S. 37; *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290), even where the likelihood of resumption of such conduct appears indeed remote, *United States v. W. T. Grant Co.*, 345 U. S. 629.

The special reason for applying the public interest rule in this case is that the Postmaster General has adopted a deliberate policy of seeking to immunize the statute against judicial review by exempting the few persons who challenge it by lawsuits. See, e.g., *Amlin v. Shaw*, S. D. Cal., No. 63-635-PH; *Heilberg v. Fixa*, N. D. Cal., N. 41660; *McReynolds v. Christenberry*, S. D. N. Y. 63 Civ. 3648, where the Postmaster-General attempted to "moot" similar lawsuits by delivering detained mail (R. 42-43; and see the dissent below, pp. 17a-18a, *infra*).

The appellant in this case has a further, and independent basis for suit under the established doctrine that litigants can, in certain circumstances, vindicate the interests of others whose rights are being infringed. *Barrows v. Jackson*, 346 U. S. 249, 255-259; *Pierce v. Society of Sisters*, 268 U. S. 510, 534-535; *N.A.A.C.P. v. Alabama*, 357 U. S. 449, 459; *Joint Anti-Fascist Refugee Committee v. McGrath*, *supra*. This doctrine is squarely applicable here because appellant represents those affected by the statute who are deterred from requesting that material be forwarded to them or from bringing suit because they would incur harm as a result of losing their anonymity. As in *N.A.A.C.P. v. Alabama*, 357 U. S. 449, it is plain that the typical recipient of "communist political propaganda" is loath to assert his rights for this reason. Appellant, himself a person subject to the statutory sanctions, is an appropriate litigant to protect the interests of others standing in the same position.

This Court has taken an appropriately liberal approach to the problem of standing to sue even in cases not involving basic constitutional liberties. See, e.g., *Parmelee Transportation Co. v. The Atchison, Topeka & Santa Fe Railway Co.*, 357 U. S. 77; *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470; and *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4. See also Jaffe, *Standing to Secure Judicial Review*, 74 Harv. L. Rev. 1265, 75 Harv. L. Rev. 255; Davis, *Standing to Challenge Governmental Action*, 39 Minn. L. Rev. 353; Comment, *Taxpayers Suits*, 69 Yale L. J. 895.

In the instant case where fundamental constitutional rights are involved, the appellant has an even more substantial litigable interest which is comparable to those sustained by the Court in similar cases. *School District of Abington Tp. Pa. v. Schempp*, 374 U. S. 203, 224 n. 9, 226; *N.A.A.C.P. v. Alabama*, 357 U. S. 449; *Joint Anti-Fascist*

Refugee Committee v. McGrath, 341 U. S. 123; *Barrows v. Jackson*, 346 U. S. 249; *Cramp v. Board of Public Instruction*, 368 U. S. 278, 283-284; *Baker v. Carr*, 369 U. S. 186, 204-208; *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 64, n. 6; *Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L. J. 599, 612-626. And see Note, 77 Harv. L. Rev. 1164, 1170, cited by Judge Feinberg in his dissent below (*infra*, 17a).

The above reasons sustaining the justifiability of this controversy are in no way limited by the statement in the opinion below that the controversy is not "ripe" because appellant's name had not yet been publicly disclosed. *Infra*, p. 13a. This assertion misconceives the ripeness doctrine, which is merely an aspect of the more general requirement that the federal courts are authorized to adjudicate only cases and controversies. "Ripeness" is a far more flexible doctrine than the court below indicated, *Adler v. Board of Education*, 342 U. S. 485; *Davis, Ripeness of Governmental Action for Judicial Review*, 68 Harv. L. Rev. 1122, *id.* 1326. An injunction is the traditional means of avoiding injuries which have not yet occurred. It is additionally appropriate here because the mere possibility of disclosure is a deterrent to free speech.

The reasons given above demonstrate that there are several distinct grounds sustaining the appellant's interest in a determination of this action. In these circumstances, the fact that there has been no "actual disclosure" in no way detracts from the existence of a controversy and its appropriateness for immediate adjudication.

CONCLUSION

The questions are substantial and the Court should note probable jurisdiction.

Respectfully submitted,

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September 10, 1964.

APPENDIX A

Opinions Below

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civ. 2422

CORLISS LAMONT d/b/a BASIC PAMPHLETS,
Plaintiff,

v.

THE POSTMASTER GENERAL OF THE UNITED STATES,
Defendant.

(Argued March 10, 1964—Decided May 5, 1964.)

LEONARD B. BOUDIN of RABINOWITZ & BOUDIN, New
York, N. Y., for plaintiff.

ROBERT M. MORGENTHAU, United States Attorney,
Southern District of New York (ANTHONY J.
D'AURIA, Asst. United States Attorney, on the brief),
for defendant.

Before:

HAYS, *Circuit Judge*, LEVET and FEINBERG, *District
Judges*.

Action to enjoin the enforcement of 39 U. S. C. § 4008 (Supp. IV 1959-62), for an order declaring § 4008 unconstitutional and that plaintiff is entitled to receive the mail referred to in that Section without complying with the procedure prescribed therein, and for an order directing the defendant to remove plaintiff's name from all lists and records he maintains of persons desiring to receive "communist political propaganda" and not to replace plaintiff's

Appendix A—Opinions Below

name upon such a list. Motion by plaintiff for summary judgment and cross-motion to dismiss the complaint pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. Defendant's motion to dismiss the complaint granted and plaintiff's motion for summary judgment denied.

Hays, Circuit Judge:

This action challenges the constitutionality of 39 U. S. C. § 4008 (Supp. IV 1959-62), added by Pub. L. 87-793, § 305(a), Oct. 11, 1962, 76 Stat. 840, which establishes a screening program for communist political propaganda originating abroad and deposited in the United States mails as unsealed mail matter. As plaintiff has requested an injunction restraining the enforcement of an Act of Congress, this court was convened pursuant to 28 U. S. C. §§ 2282, 2284 (1958).¹ Plaintiff has moved for summary judgment and defendant has cross-moved to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(1) and (6). We conclude that the plaintiff's motion should be denied and that the complaint must be dismissed.

Section 4008 requires the Postmaster General to detain all unsealed mail matter originating abroad and found to be "communist political propaganda," unless such material has been furnished pursuant to a subscription, or

¹ In *Amlin v. Shaw*, No. 63-635-PH, S. D. Cal., Feb. 13, 1964, a complaint challenging section 4008 was dismissed by a single judge, who held that it failed to present either a justiciable controversy or a substantial constitutional question. The complaint in the present case, however, was found by Judge Feinberg, to whom the case was originally assigned, to present a substantial question both on the merits and on the issue of justiciability. Accordingly, he requested the convocation of this court. See *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U. S. 713, 715 (1962). Defendant's renewed motion challenging the convocation of the three-judge court is denied.

Appendix A—Opinions Below

the addressee (upon being notified of the detention) requests delivery, or the Postmaster General otherwise ascertains the addressee's desire to receive the detained matter.² There are exceptions which include mail ad-

² The statute, 39 U. S. C. 4008, reads as follows:

"§ 4408. Communist political propaganda

(a) Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be 'communist political propaganda', shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

(b) For the purposes of this section, the term 'communist political propaganda' means political propaganda, as defined in section 1(j) of the Foreign Agents Registration Act of 1938, as amended (22 U. S. C. 611(j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951 or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended.

(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material whether or not 'communist political propaganda' addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government

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addressed to federal agencies, public libraries, educational institutions, and their officials and mail governed by a cultural exchange agreement. To implement Section 4008 the Post Office Department and the Customs Bureau maintain eleven screening points for the interception of communist political propaganda originating abroad. When it is determined that particular mail matter is communist political propaganda a notice (POD Form 2153-X) is sent to the addressee identifying the material being detained and advising the addressee that it will be destroyed within 20 days unless delivery is requested. Part of the form is a reply card on which the addressee may instruct the Post Office whether or not he wants the publication listed and similar publications delivered in the future. A list is kept of those requesting delivery of such material so that thereafter their mail will not be detained.

mails an equal amount of material for delivery in any country described in subsection (h)."

Section 1(j) of the Foreign Agents Registration Act of 1938, as amended, 22 U. S. C. 611(j), whose definition of "Communist political propaganda" is incorporated in Section 4008 provides:

"(j) The term 'political propaganda' includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States, with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence. * * *

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The facts are undisputed. Plaintiff, Corliss Lamont, is engaged in publishing and distributing pamphlets and other literature. He frequently receives both solicited and unsolicited mail from all over the world. In July 1963 Lamont was notified by the Post Office Department in San Francisco of the detention of communist political propaganda. Lamont did not reply to the notice. Instead he commenced this action to enjoin the enforcement of the statute. He alleges that Section 4008 infringes his first amendment right to freedom of speech and press and violates the due process clause of the fifth amendment by creating arbitrary and unreasonable classifications.³

Shortly after Lamont commenced his action the Acting General Counsel of the Post Office Department wrote

³ Lamont's complaint alleges that the statute is unconstitutional and void upon its face and as applied because:

"a. it violates plaintiff's right to freedom of speech and press as guaranteed by the First Amendment to the United States Constitution;

"b. it violates the due process clause of the Fifth Amendment to the United States Constitution in that it is vague, indefinite and uncertain and fails to provide adequate or any procedural safeguards for making the determination as to what is 'Communist political propaganda', assuming such a determination can ever be made;

"c. it violates the due process clause of the Fifth Amendment to the United States Constitution by creating an arbitrary and unreasonable classification, to wit: persons desiring to receive Communist political propaganda, and impliedly stigmatizing members of that class and holding them up to opprobrium;

"d. it violates the due process clause of the Fifth Amendment to the United States Constitution by creating an arbitrary and unreasonable classification, to wit: officials of United States Government agencies, public libraries, colleges, universities, graduate schools and scientific or professional institutions for advanced studies, which class is exempt from the provisions of the statute, with the result that persons in the position of plaintiff are discriminated against."

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to him advising him that the Postmaster General considered the filing of the complaint to constitute an expression of Lamont's desire to receive communist political propaganda mail matter and that, Lamont's wishes having thus been ascertained, his mail would not be detained in the future. Lamont thereupon amended his complaint to request an order directing that his name be removed from any list or record maintained by defendant of persons desiring to receive communist political propaganda. The amended complaint asserted that maintenance of such a list, with the inherent possibility of public disclosure, violated Lamont's first and fifth amendment rights.

Keeping in mind "the long-established principle that 'we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable,'" *Rosenberg v. Fleuti*, 374 U. S. 449, 451 (1963), we proceed to an examination of defendant's claim first, that the dispute is moot since the Postmaster General has ordered that Lamont's mail not be detained in the future, and second, that Lamont has made no sufficient showing of a threat of injury by reason of the listing of his name.

1. MOOTNESS

Lamont's first claim rests on the assertion that his freedom to read, a freedom he finds in the first amendment guaranty of freedom of speech and press, is infringed by the deterrent effect of the requirement that he request delivery of communist political propaganda. But that requirement is no longer applicable to him since defendant has ordered the unimpeded delivery of plaintiff's mail. And, setting aside for the moment his objection to being included in defendant's list, Lamont does not contend that

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his rights are being violated by the statute as presently applied.

When the relief sought, here the unimpeded delivery of mail, is obtained in some other manner prior to final judicial disposition, the controversy becomes moot and the court ceases to have jurisdiction. *Taylor v. McElroy*, 360 U. S. 709 (1959); *Atherton Mills v. Johnston*, 259 U. S. 13 (1922). The same principle applies even when challenged governmental action continues to affect the complainant if no objection is raised to the changed manner of its incidence. *Natural Milk Ass'n v. San Francisco*, 317 U. S. 423 (1943). See generally Diamond, *Federal Jurisdiction To Decide Moot Cases*, 94 Pa. L. Rev. 125, 133-35 (1946).

Lamont argues that a defendant cannot moot a controversy in which the public interest is involved by the expedient of ceasing to apply a statute once a court challenge has been instituted. He contends that the Government has attempted to render this action moot as part of a policy of avoiding an adjudication of the statute's validity, that the persons whose freedom is most curtailed by the statute are those too timorous to protest, and that there is consequently a public interest in permitting plaintiff to continue his action so as to obtain an adjudication on behalf of these other persons.

The cases upon which Lamont relies, *e.g.*, *United States v. W. T. Grant Co.*, 345 U. S. 629, 632-33 (1953), *Walling v. Helmerich & Payne, Inc.*, 323 U. S. 37, 43 (1944); *Southern Pacific Terminal Co. v. ICC*, 219 U. S. 498, 516 (1911), do not support his thesis. The public interest involved in those cases was that of enforcement by the Government of a regulatory statute. The cases hold that voluntary cessation of allegedly illegal conduct will not render the cause moot where the defendant is able at any time to recommence the illegal conduct. If there is no likelihood of a

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return to the old ways, the controversy will be moot even though the public interest is involved.

“The defendant is free to return to his old ways. This, *together with* a public interest in having the legality of the practices settled, militates against a mootness conclusion. * * * For to say the case has become moot means that the defendant is entitled to a dismissal as a matter of right * * * The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

The case may nevertheless be moot if the defendant can demonstrate that ‘there is no reasonable expectation that the wrong will be repeated.’”

United States v. W. T. Grant Co., *supra*, at 632-33. (Footnotes omitted; emphasis added).

It is not contended here that the Postmaster General is likely to resume detention of Lamont’s mail. Nor could it be. This is not a case where abandonment by a defendant of a prior course of conduct is to be explained by a change in attitude which may prove transient. Here the Postmaster General’s actions have at all times been consistent with the mandate of the statute. The statute has been enforced both before and after the initiation of this action. Lamont, by his own move, has changed the manner of enforcement as to him.

Moreover Lamont does not seek here to enforce a regulatory statute. He asks us to hold a statute invalid under the constitution. We know of no instance where the Supreme Court in rejecting a claim of mootness has announced a “public interest” in the adjudication of a constitutional issue. Our tradition of judicial reluctance to decide constitutional questions in advance of strictest necessity, see *Ashwander v. TVA*, 297 U. S. 288, 346-48 (1936) (Brandeis, J., concurring)—and particularly the line of decisions holding that a litigant who invokes the power to

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annul legislation on grounds of its unconstitutionality 'must be able to show * * * that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement,' *Massachusetts v. Mellon*, 262 U. S. 447, 488 (1923); see *Poe v. Ullman*, 367 U. S. 497, 502-09 (1961) (opinion of Frankfurter, J.); *Communist Party v. Subversive Activities Control Bd.*, 367 U. S. 1, 70-81 (1961); Comment, Threat of Enforcement—Prerequisite of a Justiciable Controversy, 62 Colum. L. Rev. 106 (1962)—dictates the conclusion that in cases such as this the public interest requires an exacting application of the standards governing mootness claims. See *Donaldson v. Read Magazine, Inc.*, 333 U. S. 178, 184 (1948).

Lamont's suggestion that he be permitted to represent the interests of nonparties subject to the statute does not affect our analysis of the public interest as it relates to the mootness of Lamont's first claim. Although it not infrequently happens that a party to constitutional litigation is representative of a class (e. g., taxpayers, parents), a determination of mootness will nevertheless be made on the basis of the factual circumstances applicable to the party himself, not to the class. See *Doremus v. Board of Educ.*, 342 U. S. 429, 432 (1952). We postpone until after our discussion of the problem posed by the second part of Lamont's complaint; consideration of his contention that, despite the absence of any controversy between him and the Postmaster General, he should nevertheless be permitted to sue as the representative of others similarly situated.

2. TIMELINESS OF THE SECOND CLAIM.

Lamont requests an order directing that defendant remove his name from lists and records of persons desiring to receive communist political propaganda.

Viewed separately, this part of the complaint does not state an actual controversy, for there is no allegation that

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Lamont has demanded the requested relief from the defendant or that it has or would be refused. But of course this issue cannot be so simply resolved, since defendant's acquiescence in such a demand would subject Lamont's mail to renewed detention thus reviving that aspect of the controversy. In substance, then, the complaint must be regarded not as asserting two separate claims, but as stating a single claim with alternative allegations of injury. Either plaintiff's mail is detained or he is listed as a person desiring to receive communist political propaganda. We held above that the controversy was moot insofar as it rested on an allegation of injury stemming from detention of plaintiff's mail. We now consider Lamont's contention that inclusion in a list of persons desiring to receive communist political propaganda is a sufficient showing of injury to permit him to challenge the statute as a whole.

Lamont maintains that he is injured in two respects:

(1) that the mere fact of inclusion in a list circulated to Post Office personnel infringes his right of anonymity, and

(2) that the list will be distributed to other government agencies, including Congressional investigating committees, and eventually to the general public. Both effects are said to deter him from the free exercise of his rights of speech and association.

The statute makes no provision whatsoever for keeping any list or record of persons desiring to receive communist political propaganda. Lamont assumes, presumably correctly, that such a list is kept since the agents of the Postmaster General would not otherwise be able to ascertain what persons are to get the mail in the regular course. But if any injury results from the keeping of such a list it is an injury which is purely incidental to the statutory scheme and one which appears to be wholly unintended.

It is not sufficient for a litigant merely to assert that particular government action or the threat of such action

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deters him from the exercise of some constitutional right. The claimed deterrent effect must be grounded in a realistic appraisal of the impact of the action being challenged. *Poe v. Ullman*, 367 U. S. 497, 508 (1961) (opinion of Frankfurter, J.). And when the claim of injury is based upon the prospect of future action, the threat of such action must be imminent and not hypothetical or imagined. *Poe v. Ullman*, *supra*; *Communist Party v. Subversive Activities Control Board*, 367 U. S. 1, 71-81 (1961).

Thus, in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U. S. 123 (1951), cited by Lamont, the complainants alleged both that they had been falsely classified as communist organizations and that such classification had resulted in substantial economic injury. 341 U. S. at 137, 158-59. Though these allegations, which were deemed admitted by the Attorney General, were held to establish the existence of a justiciable controversy, the Court treated the question of justiciability as a problem of substantial difficulty.

By contrast Lamont does not indicate that the present circulation of the list to government personnel or any future distribution that may occur will result in any material injury, such as loss of customers or social ostracism. Lamont does contend, in a conclusionary fashion, that future public disclosure of the list would lead to public opprobrium. It is not immediately apparent why this should be so. Classification as a person desiring to receive communist political propaganda—as distinguished from, for example, classification as a “communist front organization”—need not connote disapprobation. Indeed, the statutory exception for public libraries and for educational institutions and their officials,⁴ evidences Congressional recognition that reputable organizations and individuals may receive communist political propaganda without any disgrace attaching.

⁴ See note 2 *supra*.

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In any event, the threat of general distribution of the list is largely speculative. Lamont cites statements in Congressional hearings indicating that under the previous foreign propaganda screening program it was the practice of the Post Office to disclose to Congressional committees the names of recipients of communist propaganda. See Hearings before the House Committee on Un-American Activities, 85th Cong., 2d Sess., Sept. 3, 4 and 5, 1958, at p. 2794; cf. Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act, etc., of the Senate Committee of the Judiciary, 87th Cong., 1st Sess., Mar. 26, 1959 and April 3, 1961, at p. 56 (bulk shipments to distributors). But that program, which was initiated without specific statutory authorization and was discontinued by Executive Order on March 17, 1961, nineteen months before enactment of the present statute, differed in several important respects from the present program. See generally, Schwartz and Paul, *Foreign Communist Propaganda in the Mails: A report on Some Problems of Federal Censorship*, 107 U. Pa. L. Rev. 621, 633-49 (1959). In view of the change in administration and the material differences between the two programs, which may well be taken to manifest a basic change in administrative philosophy, we would not be disposed to lightly assume that administrative policy regarding disclosure of lists of recipients of communist propaganda has remained constant.

In support of the conclusion that administrative policy has indeed changed the Government submits an affidavit by Tyler Abell, Associate General Counsel to the Post Office Department, which states that the list kept of addressees to whom communist propaganda will be sent without detention will not be made public and that instructions have been issued prohibiting any part of the list from being released to any person, United States Government agency or other group without the express permission of the Post Office Department. As Lamont points out, this affidavit does not

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establish conclusively that disclosure will not occur, since it does not specify under what circumstances permission might be given for the list's release. But it does evidence a solicitous regard for the confidentiality of this information, and we think that on the whole this affidavit suffices to deprive the prior administrative practice cited by Lamont of whatever probative value it may have had. In this posture of the case, we can only conclude that public disclosure is only an abstract possibility, not an immediate threat.

We hold that present circulation of the list to Post Office personnel does not constitute such a legal injury as will permit plaintiff to maintain this suit, and that the threat of future public distribution of the list is not sufficiently imminent to present a controversy ripe for adjudication.

3. STANDING TO ASSERT THE RIGHTS OF THIRD PARTIES.

Lamont contends that even if this court should find that there is no justiciable controversy between him and the Postmaster General, he should nevertheless be permitted to continue this action "in order to vindicate the rights of the many persons who are not willing or able to sue but who, like the plaintiff, have been and will be injured by this enforcement of the statute." Lamont asserts that the Government's policy for administering this statute is deliberately designed to insulate it from judicial scrutiny, and that the rights of numerous individuals who are unwilling to bring suit or request delivery of detained mail matter are being abridged and will continue to be abridged if this action is dismissed. That assertion is neither admitted nor denied by the Government in this case.⁵

⁵ It should be noted, however, that a suit challenging section 4008 might be brought by a sender of detained material, *e.g.* a distributor of Russian books or magazines. Cf. amended complaint in *McReynolds v. Christenberry*, Civil No. 63-3648, S. D. N. Y., filed

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As a general rule litigants may not invoke the rights of parties not before the court.

“Nor can respondents vindicate any general interest which the public may have in the construction of the Act by the Secretary and which must be left to the political process. Respondents, to have a standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public’s interest in the administration of the law.”

Perkins v. Lukens Steel Co., 310 U. S. 113, 125 (1940); accord, *Tileston v. Ullman*, 318 U. S. 44 (1943) (fourteenth amendment claim). Although numerous exceptions have been made to the doctrine that a litigant may not assert the rights of third parties, see, e.g., *NAACP v. Alabama*, 357 U. S. 449, 459 (1958) (right of anonymity may be asserted by association on behalf of its members); *Pierce v. Society of Sisters*, 268 U. S. 510, 534-36 (1925) (private school may assert rights of the parents of its pupils), in no case has such an exception been created when, as here, the litigant failed to demonstrate that he is, in his own right, an injured party. See Sedler, *Standing To Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L. J. 599, at 630 n. 129, 646 (1962). And in general there has been some pre-existing relationship between the complainant and the person whose rights he seeks to assert other

March 30, 1964. It would not appear that such a suit could be mooted by any administrative action, and it would equally serve to secure full protection of the rights of recipients. Indeed, past challenges to statutes regulating the use of the mails, have, almost without exception, been advanced by senders, whose interest is usually more direct than that of a recipient—at least, when, as here, the mail matter involved is unsealed, unsolicited, mail. See, e.g., *Hannegan v. Esquire, Inc.*, 327 U. S. 146 (1946); *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407 (1921).

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than the fact that both are affected by the challenged statute. See Sedler, *supra* at 641-45, 647.

The present case does not fit within any of the established exceptions, and we hold that Lamont has no standing to invoke the rights of persons not parties to this action.

Defendant's motion to dismiss the complaint is granted, and plaintiff's motion for summary judgment is denied.

Settle order on notice.

PAUL R. HAYS

FEINBERG, *District Judge* (dissenting):

As the majority opinion correctly points out, while Section 4008 does not specifically authorize the Post Office to maintain a list of persons desiring to receive communist political propaganda, such a list is essential to effective implementation of the statutory scheme. Plaintiff, therefore, is in a position to challenge the constitutionality of the statute, even though his mail will not be detained in the future, if he has suffered, or is imminently threatened with, a legal injury as a result of the presence of his name on the list. The majority concludes as a matter of law that public disclosure of the list "is only an abstract possibility, not an immediate threat." It refers to the prior Post Office practice of disclosing the names on such a list to Congressional committees, but relies upon an affidavit of the Associate General Counsel of the Post Office as depriving that prior practice cited by plaintiff "of whatever probative value it may have had." This conflict on a crucial point raises a genuine issue as to a material fact—likelihood of public disclosure of the list—requiring denial of the government's motion, whether it be treated as a motion to dismiss or as one for summary judgment. *Cf.* Rule 12(b), Fed. R. Civ. P.

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The majority also finds that " . . . Lamont does not indicate that the present circulation of the list to government personnel or any future distribution that may occur will result in any material injury, such as loss of customers or social ostracism," and concludes that "classification as a person desiring to receive communist political propaganda . . . need not connote disapprobation." It may be doubted whether one asserting the justiciability of a constitutional right to anonymity need show more in the way of injury than a threat of public disclosure, *cf. Talley v. California*, 362 U. S. 60 (1960); *United States v. Rumely*, 345 U. S. 41, 57 (1953) (concurring opinion), or, perhaps, more than the limited disclosure to Post Office personnel concededly present here.¹ But, in any event, whether classification as a person desiring to receive communist political propaganda need connote public disapprobation is irrelevant, since it ordinarily does so connote, and social ostracism flows from this. *Cf. Grant v. Reader's Digest Ass'n*, 151 F. 2d 733, 735 (2 Cir.), cert. denied, 326 U. S. 797 (1946).

Therefore, I dissent from the grant of the government's motion. In addition, were I to follow the lead of the majority in making a finding as to this issue on this record, I would be inclined to conclude that there is a sufficient threat of injury to satisfy the requirement of "ripeness." This conclusion would be predicated largely on the irreparable nature of the threatened injury and the improbability of plaintiff having sufficient notice of public disclosure of the list to allow him to raise his constitutional objections before the injury is inflicted.

¹ *Cf. Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U. S. 123, 139-41 (1941) (characterizing the listing challenged there as defamatory); RESTATEMENT, TORTS § 577 (publication rule in defamation cases).

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In addition, the majority opinion concedes that there are numerous exceptions to the doctrine that a litigant may not assert the constitutional rights of third parties. It concludes that this case is not appropriate for invoking one of the exceptions because plaintiff has failed to demonstrate that he is, in his own right, an injured party. However, if the conclusion as to ripeness with regard to the list is incorrect (as I think it is), then the rights of third parties who themselves might be afraid to bring suit are significant. Thus, one of the arguments advanced against Section 4008 is that the standard of "communist political propaganda" is so vague that it could include relatively inoffensive publications.² Yet, one who would make this argument in testing the constitutionality of Section 4008 must either announce an interest in communist political propaganda and invite social disapprobation or forego the mail affected by the Section. Allowing plaintiff in this suit to raise the rights of third parties would extricate them from this dilemma. Note, 77 Harv. L. Rev. 1165, 1170 (1964).

There is another factor here which may not of itself furnish sufficient basis for denying the government's action but which warrants comment. This is one of several actions brought to test the constitutionality of Section 4008 by a recipient whose mail has been withheld. In each case, after the complaint had been served, the Postmaster General delivered such mail to the plaintiff and then asked the court to dismiss the action as moot.³ With commend-

² Cf. Douglas, *The Right of Association*, 63 Colum. L. Rev. 1361, 1372 (1963).

³ In addition to the instant case, complaints were filed in the Northern District of California (*Heilberg v. Fixia*, No. 41660, N. D. Cal.) and the Southern District of California (*Amlin v. Shaw*, No. 63-635-PH, S. D. Cal.). It appears that the government's position in both cases was as stated in the text. See Transcript of hearing in the *Heilberg* case, dated October 24, 1963, p. 5; Judgment of Dismissal in the *Amlin* case, dated February 13, 1964, on the ground, *inter alia*, that there is no justiciable case or controversy.

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able candor, the government admits that this device, if approved by the courts, will prevent any potential recipient of such mail from testing the statute.⁴ I doubt whether the doctrine of mootness or justiciability requires this result, cf. *Mechling Barge Lines v. United States*, 368 U. S. 324, 331-36 (1961) (dissenting opinion), particularly where a First Amendment right is allegedly involved.

This dissent is not to be taken as expressing any opinion as to the constitutionality of Section 4008, since the majority opinion does not reach these issues, and it would, therefore, be inappropriate for me to do so.

May 5, 1964.

WILFRED FEINBERG,
U. S. D. J.

⁴ Transcript of oral argument, pp. 61-62.

APPENDIX B**Judgment Below****UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK****ORDER****63 Civ. 2422**

CORLISS LAMONT d/b/a BASIC PAMPHLETS,**Plaintiff,****—v.—****THE POSTMASTER GENERAL OF THE UNITED STATES,****Defendant.**

The complaint herein having been filed on August 13, 1963 and the amended complaint having been filed on December 3, 1963 and the plaintiff having made application to this Court (Wilfred Feinberg, United States District Judge, sitting) for the convocation of a three-judge court and the defendant having opposed said application and having moved to dismiss the amended complaint and Judge Feinberg having granted plaintiff's application and having denied defendant's motion and a three-judge court having been convened consisting of Paul R. Hays, U. S. C. J.; Richard H. Levet, U. S. D. J.; and Wilfred Feinberg, U. S. D. J. and the plaintiff having moved before the three-judge court (a) for summary judgment, (b) to amend the caption to read as set forth above and (3) to have the matter proceed and be decided upon the amended complaint and the defendant having consented to amending the caption and

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to proceeding upon the amended complaint and the defendant having moved before the three-judge court to dismiss the amended complaint and having renewed the objection to the convocation of the three-judge court and the matter having come on to be heard before the three-judge court and the court having filed its written opinions, it is hereby,

ORDERED, ADJUDGED AND DECREED, that the plaintiff's motion for summary judgment be and the same hereby is denied, and it is further,

ORDERED, ADJUDGED AND DECREED, that the caption of this matter be and the same hereby is amended to read as set forth above, and it is further,

ORDERED, ADJUDGED AND DECREED, that this matter proceed and be decided upon the amended complaint, and it is further,

ORDERED, ADJUDGED AND DECREED, that the amended complaint be and the same hereby is dismissed with prejudice, and it is further,

ORDERED, ADJUDGED AND DECREED, that the defendant's objection to the convocation of the three-judge court be and the same hereby is overruled.

Dated: New York, New York,
May 19th, 1964.

PAUL R. HAYS,
U. S. C. J.

RICHARD H. LEVET,
U. S. D. J.

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I dissent from so much of the foregoing order as grants defendant's motion to dismiss the amended complaint and in view of the action of the majority do not reach the plaintiff's motion for summary judgment.

WILFRED FEINBERG,
U. S. D. J.

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OCT 14 1964

JOHN F. DAVIS, CLERK

No. 491

In the Supreme Court of the United States

OCTOBER TERM, 1964

**OSCAR LAROFF, DOING BUSINESS AS
BASCO PAPERLITER, APPELLANT**

THE POSTMASTER GENERAL OF THE UNITED STATES

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK**

NOTICE TO APPEAR

ARCHIBALD COX,

Solicitor General

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Assistant Attorney General

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Department of Justice

Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 491

**CORLISS LAMONT, DOING BUSINESS AS
BASIC PAMPHLETS, APPELLANT**

v.

THE POSTMASTER GENERAL OF THE UNITED STATES

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK**

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, the appellee moves that the judgment of the district court be affirmed.

STATEMENT

This action was instituted by appellant to challenge the constitutionality of 39 U.S.C. 4008, a statute establishing certain postal procedures with respect to unsealed mail matter which, under Section 1(j) of the Foreign Agents Registration Act, 22 U.S.C. 611(j), constitutes "communist political propaganda" and which originates, is printed or otherwise prepared in a foreign country. Under the statute, which was enacted in 1962, 76 Stat. 840, the appellee is required to

detain all such mail which is not furnished pursuant to subscription and which is not known to be desired by the addressee, and is to deliver such mail only upon the addressee's request. In administering the statute, the Post Office detains any mail which comes within its terms¹ and sends to the addressee a notice identifying the material being detained and advising him that unless he requests delivery by returning the notice and checking the appropriate box, the mail will be destroyed. The Post Office keeps a file of the addresses of those who have expressed an intention to receive such mail in order to facilitate the distribution of this type of mail to willing recipients.

Appellant filed a complaint in the United States District Court for the Southern District of New York on August 13, 1963, in which it was alleged that mail addressed to appellant, including at least one copy of the "Peking Review," had been detained by the Post Office, and that notification of this detention had been mailed to appellant. Appellant requested that a three-judge court be empaneled, that the execution of the statute be enjoined, and that the statute be declared unconstitutional on the ground that it violated the First and Fifth Amendments of the United States Constitution (R. 31-41).

On August 30, 1963, the Acting General Counsel of the Post Office Department notified appellant that the filing of the complaint was deemed by the Post

¹ The determination as to what mail qualifies as "communist political propaganda," which the statute delegates to the Secretary of the Treasury, is made by the Customs Bureau of the Treasury Department.

Office Department to be "an expression of desire * * * to receive all of your mail whether or not the Customs Bureau of the Treasury Department considers it to be Communist political propaganda." The letter advised appellant that instructions had accordingly been issued to postmasters at all foreign screening points "that any mail presently being detained be dispatched and that in the future mail addressed to Basic Pamphlets or to yourself not be detained" (R. 34, 41, 53).

Appellant thereupon amended his complaint to allege that a list or record was being kept of all persons wishing to receive mail of the sort involved in this case and that the keeping of this list violated the Due Process Clause of the Fifth Amendment in that it impliedly stigmatized the arbitrarily drawn class of "persons desiring to receive Communist political propaganda" (R. 29-34).

Appellant moved for summary judgment, and the appellee filed a cross-motion to dismiss the complaint on various grounds, contending principally that the case was moot as a result of the orders issued by the Post Office not to detain any of appellant's mail. A three-judge court was convened. It granted the motion to dismiss on the ground of mootness. All three judges apparently agreed that the case was moot insofar as it involved alleged detention of mail. A majority of the court also held that any claim based on the list or file kept by the Post Office Department was not ripe for adjudication because the possibility of injury to appellant was merely hypothetical and the threat that the list would be generally distributed

was "largely speculative." Judge Feinberg dissented on the ground that the threat of public disclosure made appellant's claim regarding the Post Office list ripe for adjudication.

ARGUMENT

We submit that the majority of the three-judge district court correctly concluded that this case, in its present posture, presented no controversy ripe for adjudication, and that the issue sought to be presented by appellant—i.e., the constitutionality of 39 U.S.C. 4008—could not be decided in this litigation. Consequently, the dismissal of appellant's complaint was proper and should be affirmed.

1. The district court was correct in concluding that this action is moot insofar as appellant seeks thereby to obtain unimpeded delivery of his mail. It is undisputed that all appellant's mail is now being delivered to him without detention of any sort, and, under the terms of the statute, no latitude is allowed the Postmaster General to detain mail after he has become aware that the addressee desires to receive it. Hence appellant is assured of receiving his mail now and in the future, and this is "the ultimate relief which he demanded" (*Taylor v. McElroy*, 360 U.S. 709, 711) and to which he would be entitled if he were to prevail on the merits.

Nor can the Postmaster General's conduct be condemned as a "deliberate policy" (*Juris. St.*, p. 11) of avoiding a test of constitutionality. The statute unequivocally exempts from the detention requirement any of the defined mail matter "which is otherwise

ascertained by the Postmaster General to be desired by the addressee." The Post Office would have no authority whatever to detain appellant's mail if it were directly notified by appellant that he wished to receive it. The statute embodies a Congressional policy to leave entirely free access for such mail to persons who want it. Since the statute prescribes no formal notification to the Postmaster General, it is immaterial whether an addressee notifies him directly or whether the Postmaster General "otherwise" learns of that addressee's wishes. In the present case the Postmaster General complied with the statutory obligation by releasing all of appellant's mail after learning that appellant had brought suit—a clear indication of his desire not to have his mail detained.

Accordingly, under well-established principles, the present case has become moot by reason of appellant's expression of desire to receive his mail and the Postmaster General's compliance—as required by statute—with that expression. See *Taylor v. McElroy*, 360 U.S. 709; *Atherton Mills v. Johnston*, 259 U.S. 13. No order which the district court could enter regarding the delivery of appellant's mail could grant him any right which he does not now possess.²

² The rights of other potential recipients may not be asserted in this suit by appellant. As the district court observed (Juris. St., p. 14a), this is not a case like *NAACP v. Alabama*, 357 U.S. 449, and *Pierce v. Society of Sisters*, 268 U.S. 510, in which an organization or institution is asserting the rights of its members. In the present case, as in *Tileston v. Ullman*, 318 U.S. 44, one individual—who cannot be affected by the judgment—is seeking to vindicate the rights of other individuals. This is the classic situation in which the plaintiff must be said to lack standing. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125.

It is no answer to argue, as appellant does (Juris. St., p. 11), that this case involves a question of "continuing public interest." This interest, if it exists, may be asserted in the future by parties whose rights can be affected by a judgment. As the majority of the district court observed (Juris. St., pp. 13a-14a n. 5), a suit brought by a sender of detained material would raise almost identical issues and would not become moot if the Postmaster General were to deliver the mail to any particular addressee who indicated his desire to receive it. And it is the sender, rather than the potential recipient, who would be most seriously affected by any constitutional infirmity of the statute.

Nor do the decisions cited by appellant stand for the proposition that "continuing public importance," standing alone, renders justiciable an otherwise moot case. In all the decisions cited, there was at least a possibility, albeit a remote one, of repeated enforcement against the plaintiff of the allegedly unconstitutional statute. As the Court observed in *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43, "Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power." (Emphasis added.) The discontinuance in the present case, rather than being "voluntary," was under compulsion of the statute, and this operates as a permanent safeguard against any interference with petitioner's mail.

2. The district court was also correct in concluding that retention of appellant's name on the Post Office list or in its files did not provide a basis for a justiciable claim. If appellant's claim is that any inclusion on the list renders him notorious and "stigmatizes"

his name as an individual who desires to receive "communist political propaganda," it must be observed that these consequences flow from the maintenance of this very action—a course undertaken voluntarily by appellant. Hence even if his name were to be removed from the Post Office list, its public association with this lawsuit would remain. Appellant's objection—which is principally to the public association of the list with communist propaganda—could not, therefore, be met by any order of the district court.

If, on the other hand, appellant's objection is to some future use to which the list may be put, the district court was correct in concluding that such claim was merely hypothetical and not, therefore, ripe for judicial consideration. On the face of the pleadings in this case it appears that any decision concerning use of the list would involve this Court in "abstract, hypothetical or contingent questions" which "[i]t has long been its considered practice not to decide." *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461; see *Poe v. Ullman*, 367 U.S. 497.

3. Since the district court did not reach the merits of the constitutional claim, and since that claim cannot be considered insubstantial, we do not urge summary affirmance on the ground of the statute's constitutionality. If the Court is of the view that there is a substantial question concerning the district court's ground for dismissal, we agree that probable jurisdiction should be noted and the case set for argument.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

KEVIN T. MARONEY,
LEE B. ANDERSON,
Attorneys.

OCTOBER 1964.

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Office-Supreme Court, U.S.

FILED

NOV 13 1964

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

No. 491

CORLISS LAMONT, doing business as
BASIC PAMPHLETS,

Appellant,

v.

THE POSTMASTER GENERAL OF THE
UNITED STATES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION

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THE POSTMASTER GENERAL OF THE UNITED STATES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION

Pursuant to paragraph 3 of Rule 16 of the Revised Rules of this Court, the appellant files this brief in opposition to the appellee's motion that the judgment of the District Court be affirmed.

Statement

The appellee recognizes the substantiality of appellant's constitutional claim on the merits (Motion, p. 7).¹ Appellee's argument is that in certain respects the action is moot and in others not ripe for adjudication.

¹ "Motion" refers to appellee's motion to affirm; "R." to the record filed in this Court; and "Jur. St." to the jurisdictional statement.

Argument

1. Appellant's present receipt of mail is not "the ultimate relief which he demanded" within this Court's intentment in *Taylor v. McElroy*, 360 U. S. 709, 711. There, the litigant received all the relief he sought, *viz.*, his access to classified defense information; he did not challenge the Government's basic power to require security clearance.² In contrast, appellant has challenged the Government's power to withhold mail or compel listing, his name still appears on eleven lists of the Postmaster General of persons desiring to receive "Communist political propaganda," and such information is likely, as experience shows, to be turned over to congressional committees and thereafter disseminated officially and publicly.³

Appellee's reliance upon *Atherton Mills v. Johnston*, 259 U. S. 13 is likewise misplaced. That case merely held that a suit instituted by a minor to enjoin the Child Labor Act as unconstitutional became moot when the plaintiff reached his majority.⁴

² In addition, the Solicitor General made certain representations which included the fact "that petitioner stands in precisely the same position as all others who have been granted clearance, that the evidence in petitioner's file will not be used against him in the future, and that the findings against petitioner have been expunged." (*Ibid.*)

³ In opposing passage of the statute, Senator Joseph S. Clark noted that "clearly a stigma might be attached" to those who request delivery of Communist political propaganda, S. Rep. No. 2120, 87th Cong. 2d Sess. (1962), p. 44 (Individual views). He added that "the information might well find its way to FBI files." (*Ibid.*) The extent of the possible injury is indicated by the printing of an additional 75,000 copies of an earlier congressional committee blacklist, "A Handbook for Americans" (*Methodist Federation v. Eastland*, 141 F. Supp. 729 (D. D. C. 1958)).

⁴ The suit also appeared to be a contrived one, the United States being omitted as a party, 259 U. S. 13, 15; see also *C.I.O. v. McAdory*, 325 U. S. 472, 475.

2. The appellee appears to have misunderstood the appellant's reference to the appellee's "deliberate policy" of avoiding a test of constitutionality (Motion, p. 4). Even assuming what is most unlikely, that the institution of a lawsuit was within the contemplation of the statute, this policy of avoidance is additional reason to apply the public interest rule; else the statute, whose constitutionality is concededly in substantial doubt (Motion, p. 7), remains to interfere with the First Amendment rights of citizens.⁵ It is over-generous for appellee to say that the statute "embodies a Congressional policy to leave entirely free access for such mail to persons who want it" (Motion, p. 5); rather, the congressional hearings reveal a firm determination to obstruct transmittal of such reading matter, with the only issue being that of method.⁶

3. This is not, as appellee seems to suggest, the case of a litigant himself unaffected who volunteers to assert the rights of others (Motion, p. 5, n. 2). Appellant instituted this lawsuit upon personally suffering a clear justiciable injury not questioned by the court below, and as a necessary result of the same statute's operations, he continues to suffer directly related justiciable injuries (*infra*, p. 5). As District Judge Feinberg stated in his dissent: "• • • if the conclusion as to ripeness with regard to the list is incorrect (as I think it is), then the

⁵ The details of the statute's present enforcement may be found in *Exclusion of Communist Political Propaganda from the U. S. Mails*, Hearings before the Postal Operations Subcommittee of the House Post Office and Civil Service Committee, June 19-20, 1963, pp. 1-64; and in Schwartz, *The Mail Must Not Go Through—Propaganda and Pornography*, 11 U. C. L. A. L. Rev. 805 (July 1964).

⁶ See Hearings on *Postal Rate Revision of 1963*, H. R. 7927, 87th Cong. 2d Sess. before the Senate Committee on Post Office and Civil Service (Aug. 21, 1962) pp. 827 *et seq.*, herein called the Senate Hearings; S. Rep. 2120, 87th Cong. 2d Sess. (1962) pp. 21-22; H. Rep. No. 1155, 87th Cong. 1st Sess. (1961) pp. 10-11.

rights of third parties who themselves might be afraid to bring suit are significant" (Jur. St., p. 17a).

Further, this Court has not established an absolute rule against standing to assert the rights of third parties. It has made exceptions to the rule wherever the equities seemed to require it after a full consideration of the problem on the merits. See the cases cited, Jur. St., pp. 12-13.⁷ It has said that "[t]he principle [of standing] is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court," *N.A.A.C.P. v. Alabama*, 357 U. S. 449, 459.

The two cases on standing cited by appellee are not apposite to the instant one. In *Tileston v. Ullman*, 318 U. S. 44, the plaintiff made no claim of injury to himself. In *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 125, this Court held that one without right to challenge the minimum wage provisions of the Public Contracts Act of 1936 could not find standing in the "general public's interest in the administration of the law."

4. The appellee sees no injury in the retention of appellant's name on Post Office lists despite this Court's many recent decisions on state and federal "subversive" lists (Jur. St., p. 7). His suggestion that the stigma flows "from the maintenance of this very action" (Motion, p. 7) overlooks the ameliorating effect of a judicial declaration that

⁷ The rule is qualified by such references as "ordinarily," "a complementary rule of self-restraint" and "its usual rule" in *Barrows v. Jackson*, 346 U. S. 249, 255-257. "Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification." *Poe v. Ullman*, 367 U. S. 497, 508, 524. The court below gave greater recognition than does appellee to this fact (Jur. St., p. 14a). See also Mr. Justice Frankfurter's comprehensive discussion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 149-157 (concurring opinion).

the lists are invalid.⁸ On appellee's theory, the very institution of a libel suit would be a ground for its own dismissal or for mitigation of damages since the plaintiff would be spreading the libel.

Appellee apparently recognizes that appellant might be injured by "some future use to which the list may be put" (Motion, p. 7). This, however, appellee treats as "merely hypothetical and not, therefore, ripe for judicial consideration" (Motion, p. 7). But, if the past is prologue, there is surely nothing hypothetical about (i) the danger that the lists will be delivered to other government agencies; (ii) the issuance of congressional committee subpoenas to the listed persons; and (iii) the public dissemination of these and other names in official blacklists in the thousands (Jur. St., p. 8). The danger to appellant is far greater and more immediate than the hypothetical criminal prosecution mentioned in *Cramp v. Board of Public Instruction*, 368 U. S. 278.

The instant case is a far cry from the two authorities relied upon by appellee (Motion, p. 7): (1) this Court's refusal to adjudicate the constitutionality of a state law (with whose enforcement the litigant was *not* threatened) until the state courts had acted, *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450; and (2) its view that the desuetude of Connecticut's birth control laws nullified any case or controversy, *Poe v. Ullman*, 367 U. S. 497; and see Mr. Justice Harlan's dissenting opinion, 367 U. S. 497, 522-539.

5. Appellee seeks in two ways to palliate its attempted immunization from judicial review of a statute affecting First Amendment rights. First, appellee urges that "it is

⁸ Also, "[p]ublic attitudes toward a judicial challenge to the program may well be different and less condemnatory than public attitudes toward government disclosure of a list of willing recipients of foreign Communist propaganda", Schwartz, *op. cit.* 843.

the sender, rather than the potential recipient, who would be most seriously affected by any constitutional infirmity of the statute" (Motion, p. 6). This novel argument is directly controverted by this Court's decisions (See, e.g., *Grosjean v. American Press Co.*, 297 U. S. 233, 247, 250, and *United States v. C. I. O.*, 335 U. S. 106, 144) and by the very argument of the Attorney General in opposing passage of this statute that "[t]he first amendment is intended to preserve the people's right to access to ideas, good or bad."⁹ Second, appellee suggests that a suit by a sender could not be mooted; the difficulty is that the very case cited by appellee was dismissed for mootness on still another ground, *McReynolds v. Christenberry* (S. D. N. Y., 63 Civ. 2422) petition for cert. pending, Oct. Term, 1964, No. 605.

6. The foregoing arguments, it is submitted, show decisively that under the Court's decisions, particularly in the First Amendment area, there is a justiciable controversy between the parties. In any event, this issue is so inextricably woven into the merits of the controversy, including the effect of the various governmental sanctions of detainer, listing and disclosure upon First Amendment rights,¹⁰ that it is more appropriately resolved after full argument upon the merits.

⁹ Deputy Attorney General (now Associate Justice) White in the Senate Hearings, *supra*, note 6, p. 830; see also *Zeitlen v. Arnebergh*, 59 Cal. 2d 901, 383 P. 2d 152, cert. denied sub nom *Arnebergh v. Zeitlen*, 84 S. Ct. 445.

¹⁰ As Mr. Justice Frankfurter said in *Joint Anti-Fascist Refugee Committee v. McGrath*, *supra*, n. 7 at p. 156, "[w]hether 'justiciability' exists, therefore, has most often turned on evaluating both the appropriateness of the issues for decision by courts and the hardship of denying judicial relief." See also the Justice's similar observation in *Poe v. Ullman*, 367 U. S. 497, 508-509.

CONCLUSION

The appellee's motion to affirm the judgment of the District Court should be denied.

Respectfully submitted,

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November 12, 1964.

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Office-Supreme Court, U.S.

FILED

NOV 28 1964

JOHN E. DAVIS, CLERK

IN THE
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No. 491

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UNITED STATES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

**APPELLANT'S SUPPLEMENTAL BRIEF
IN OPPOSITION**

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**APPELLANT'S SUPPLEMENTAL BRIEF
IN OPPOSITION**

On November 12, 1964, appellant filed a brief in opposition to the appellee's motion to affirm the judgment of the District Court. Thereafter, on November 18, 1964 a statutory court in another district rendered a unanimous decision in a similar case, *Heilberg v. Fixa* (S. D. Cal. No. 41660), holding that 39 U. S. C. 4008 is unconstitutional. We deem it appropriate to call that decision to the attention of this Court and have annexed it hereto as an appendix.

The decision of the statutory court in the *Heilberg* case is particularly pertinent to the claim of mootness raised by the appellee in this case. On that point the California court explicitly disagreed with the court below and adopted the arguments which are made by appellant in his jurisdictional statement and in his earlier brief in this Court (*infra*, pp. 5-6).

The California court also agreed with appellant's arguments on the merits as previously expressed to this Court and made specific reference to District Judge Feinberg's dissenting opinion below (*infra*, p. 9). However, it may be noted that the appellee agrees that the constitutional issue on the merits justifies the notation of probable jurisdiction (Motion to affirm, p. 7), a view which it reiterates in its memorandum in opposition in *McReynolds v. Christenberry*, Oct. Term 1964, No. 605.

Respectfully submitted,

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VICTOR RABINOWITZ,
Attorneys for Appellant.

APPENDIX

Order Enjoining Defendants

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

No. 41660

LEIF HEILBERG,

Plaintiff,

vs.

JOHN F. FIXA, et al,

Defendants.

Before BONE, *Circuit Judge*,
WOLLENBERG and ZIRPOLI, *District Judges*.

Per Curiam

In this action plaintiff seeks to enjoin the enforcement of 39 U.S.C., Section 4008, a statute which regulates the mailing of "communist political propaganda", and an order declaring it unconstitutional. This Court was convened pursuant to 28 U.S.C., Section 2282, Section 2284. Based on the record made at the hearing on the merits and facts established at prior pretrial proceedings before this Court, including the hearing on defendants' motion to dismiss which was denied, we hold that 39 U.S.C., Section 4008 is unconstitutional on its face, as it infringes plaintiff's rights under the First Amendment of the Constitution of

the United States, and defendants are enjoined from enforcing this statute.

In order to disclose the constitutional infirmities of the statute at issue, it is necessary to describe briefly its operation. Upon a determination by the Secretary of the Treasury that unsealed mail originating in a foreign country is "communist political propaganda", as defined in 22 U.S.C., Section 611(j), The Foreign Agents Registration Act of 1938 as amended, the Postmaster General is authorized to detain the mail upon its arrival for delivery in the United States. The addressee may receive the mail if it was sent pursuant to a subscription or it is ascertained by the Postmaster General that the mail is "desired by the addressee". Mail addressed to government agencies, certain educational institutions and mail governed by cultural exchange agreements is excepted from the operation of the statute.

To implement Section 4008 the Postmaster General and the Customs Bureau maintain eleven screening points in the United States for the interception of "communist political propaganda". The Customs Bureau decides which countries' mail is to be screened and examines such mail routed through the eleven screening points to determine whether it falls within the statutory definition. When it is determined that particular mail is to be classified "communist political propaganda", the addressee is mailed POD Form 2153-X identifying the mail and advising him that it will be destroyed unless he signifies a desire to receive it by returning the form appropriately marked. The addressee may signify a desire to receive the particular mail being detained or a desire to receive the detained mail and any similar publications. A file of cards is maintained of those individuals requesting delivery in the latter case. Thereafter, upon a determination that mail is "communist political propaganda", it is mailed to the addressee without further inquiry.

In the instant case plaintiff received, on or about July 12, 1963, a letter from defendant Fixa containing POD.

Form 2153-X. The card notified plaintiff that the Post Office was holding a piece of unsealed mail matter entitled "A Proposal Concerning the International Communist Movement", which would be destroyed unless plaintiff returned the form appropriately marked within twenty days. Plaintiff refused to sign the card and instead filed this suit. Thereafter, the General Counsel of the Post Office Department notified plaintiff that the filing of this suit constituted an expression of a desire to receive all mail that was and in the future would be detained under the provisions of Section 4008. In short, contrary to plaintiff's wishes, his name was placed on a list of those people desiring to receive "communist political propaganda".

Initially, defendants argue that this action has been rendered moot by the aforementioned action of the General Counsel of the Post Office. This same defense was raised, successfully, in *Lamont v. Postmaster General of the United States*, 229 F. Supp. 913 (1964). We cannot agree with that distinguished court. Plaintiff's mail is still subject to delay, since mail originating from designated countries must continue to be classified; his name remains on the Postmaster's list of persons desiring to receive communist political propaganda; and there is no guarantee that this list will not be used to his detriment.

To render this case moot under these circumstances is to approve a device which would enable defendants to prevent any potential recipient of mail originating abroad from ever testing the constitutionality of Section 4008. We are not persuaded that the doctrine of mootness requires this result.

It is a well established principle that the " . . . voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e.,

¹ The *Lamont* court assumed, presumably on the record before it, that once the government agreed no longer to detain the plaintiff's mail, there would be "unimpeded delivery". *Id.* at 916. The record herein is clearly to the contrary.

does not make the case moot." *United States v. W. T. Grant Co.*, 345 U. S. 629, 632 (1953). Admittedly, the case may be nevertheless moot if defendant can demonstrate that the alleged wrong will not be repeated. But what is at issue here is by the very nature of the disputed statute a continuing act. Defendants are required by Section 4008 to continue to detain and classify mail which may be addressed to plaintiff in the future. The action of the General Counsel of the Post Office has caused plaintiff's name to be placed on a list which will continue to exist so long as the statute is enforceable. These are the very practices which are at issue here, and plaintiff is entitled to have the legality of these practices litigated. See *United States v. W. T. Grant Co.*, *supra*, 632-633.

Furthermore, we think contrary to the court in *Lamont* that plaintiff may also assert the rights of third parties. Generally, a person cannot assert the constitutional rights of others. But this is merely a rule of practice which will not be applied where the fundamental constitutional rights of third parties may be denied and it would be difficult for the persons whose rights are asserted to maintain a suit in their own right. See *Barrows v. Jackson*, 346 U. S. 249, 255-257 (1953). Here, persons interested in receiving political matter from abroad may be deterred from bringing suit to challenge Section 4008, lest this be construed as an expression of a desire to receive "communist political propaganda". The social stigma and economic injury they may suffer is very real. We do not think a person should be made to suffer social disapprobation in order to assert his constitutional rights.

Having satisfied ourselves that this action is not moot and that plaintiff has standing to sue, both in his own right and as a representative of third parties, we now turn to the constitutional issue.

The Constitution, Article I, Section 8, invests Congress with the power to regulate the postal system. See also *Ex parte Jackson*, 96 U. S. 727 (1877). But it is axiomatic

that this power is not absolute and unfettered. Congressional power in this area is limited and conditioned by other provisions of the Constitution. Thus " . . . Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional." *Speiser v. Randall*, 357 U. S. 513, 518 (1958). See also *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 155-156 (1946). The apparent conflict between congressional power to regulate the postal system and its impotence to enact postal legislation which tends to inhibit or deter the exercise of First Amendment rights must be resolved by balancing legitimate legislative purposes served by the statute against the restrictions imposed on rights otherwise guaranteed by the First Amendment. See e.g. *Dennis v. United States*, 341 U. S. 494, 510 (1951); *Schneider v. State*, 308 U. S. 147 (1939).

In striking this balance we are mindful that First Amendment rights are not absolute, but it is too late in the day to doubt the preferred status these rights enjoy in our constitutional scheme. See *Sherbert v. Verner*, 374 U. S. 398 (1963). The reasons for this preferred status were carefully explained by the Supreme Court in *Thornhill v. Alabama*, 310 U. S. 88, 101-102 (1940):

"The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropri-

ate to enable the members of society to cope with the exigencies of their period."

In a recent elaboration of the so-called balancing test, the Supreme Court has indicated that only a compelling state interest could tip the scale in favor of a statute which burdens the exercise of First Amendment rights. See *Sherbert v. Verner*, 374 U. S. 398, 406. Moreover, even if a compelling state interest were shown, the burden remains on the state " * * * to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Sherbert v. Verner*, *supra*, at 407. With these considerations in mind, we turn now to the case at bar.

What injuries have been suffered by plaintiff? He asserts that his mail is subject to unnecessary delay because of the screening program made necessary by Section 4008. Whether this delay alone constitutes an unconstitutional abridgment of plaintiff's First Amendment rights, we need not decide. A more serious obstacle to the exercise of these rights arises out of the statute's requirement that the addressee of "communist political propaganda" indicate a "desire" to receive it. Apparently, the statute contemplates that once an addressee has manifested this desire to receive such mail, future "communist political propaganda", after it has been so classified, will not be further detained. This requires, of course, that the Post Office maintain a list of persons indicating a desire to receive this type of mail. The statute does not itself provide for such a list, but it is difficult to see how the program could operate otherwise. Indeed, the Post Office has initiated just such a procedure in the instant case. See also *Lamont v. Postmaster General of the United States*, *supra*, at 916. At a minimum plaintiff is required by the statute to disclose a desire to receive communist political propaganda.

The right to distribute and receive controversial literature may require constitutional protection where disclosure

may subject the distributor or recipient to social disapprobation or economic injury. In *Talley v. California*, 362 U. S. 60 (1960), the Supreme Court had before it an ordinance requiring that handbills show the name of the distributor. The Court said: "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression.", *Talley v. California, supra*, at 64. If identification of a distributor is constitutionally impermissible, a fortiori, identification of a recipient, whose rights are similarly protected [see *Martin v. Struthers*, 319 U. S. 141 (1943)], would no less "tend to restrict . . . freedom of expression".

That a person may be reluctant to disclose his desires under the circumstances of this case is not fanciful. Similar lists under earlier non-statutory screening programs were routinely turned over the House Committee on Un-American Activities. See Hearings before the House Committee on Un-American Activities, 85th Congress, 2d Session, p. 2794 (1958). Assurances by defendant that these practices have been discontinued cannot be reasonably expected to mitigate a person's reluctance to have his name associated with "communist political propaganda". There are no similar assurances that this information will not be made available in the future in view of the lack of a statutory requirement that information received pursuant to Section 4008 remain confidential.

Moreover, the practices made necessary by Section 4008, we are convinced, cannot help but deter the free expression of ideas. It is a fact that people who associate themselves in whatever fashion with anything "communist" are very likely to suffer social disapprobation. See Judge Feinberg's dissenting opinion in *Lamont v. Postmaster General of the United States, supra*, at 921.

A reading of the legislative history² makes it abundantly clear that the purpose of the new legislation was primarily to control, restrict and prevent the delivery of matter found to be communist propaganda, an infringement upon the dissemination of ideas, and, therefore, a clear and direct invasion of First Amendment territory. To overcome this infirmity in the statute the government must assert and prove that there is a compelling state interest and that no alternative remedy would achieve the end desired without infringement. *Sherbert v. Verner, supra*, at 406-407. This the government has failed to do, for its alleged state interests, while "compelling" in theory, are insubstantial, illusory in fact and ignore available alternatives. They are clearly incompatible with the requirements of a free society.

The defendants have asserted as the purpose of Section 4008 that "the statute is designed to permit the non-delivery of large quantities of unsealed mail matter determined to be communist political propaganda which most people do not want to receive and which they should not be required to receive against their wishes" (emphasis added). In *Martin v. Struthers*, 319 U. S. 141 (1943), the Supreme Court held unconstitutional a handbill statute whose asserted purpose was to protect householders from annoyance and intrusion. The Court said:

"Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving

² "Postal Rate Revision of 1962", Hearings before the Senate Committee on Post Office and Civil Service, 87th Congress, 2d Session (1962); "Exclusion of Communist Political Propaganda From The U. S. Mails", Hearings before the House Committee on Post Office and Civil Service, 88th Congress, 1st Session (1963).

to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." (Id. at 146-147).

Even if this asserted purpose were to be found compelling, there is a readily available alternative which would protect the recipient's interest without infringing upon the free expression of others. The Federal regulations [39 C. F. R. 44.1(a)] provide that any person may authorize the postmaster to withhold the delivery of specifically described classes of foreign printed matter and to substitute his judgment as to classification for that of the addressee.

Another purpose asserted for Section 4008 is that it is designed to avoid a taxpayer's subsidy for the delivery of communist political propaganda. Assuming that this purpose is other than ill-concealed assertion of the right of the government to control, via the postal rates (see *Hannegan, supra*), certain political ideas which would run afoul of the First Amendment, it is evident that Section 4008 as applied does not and cannot accomplish this purpose. The evidence clearly shows that the administration of Section 4008 is far more costly than the direct delivery of the mail. In short, the statute imposes on the taxpayer an even greater subsidy. In any case, the taxpayer qua taxpayer does not pay for any portion of foreign mail sent from or received in this country. The government is authorized to adjust foreign mail rates so as to avoid any net cost to the taxpayer. See 39 U. S. C. Section 505.

Finally, the government asserts in its trial brief that Section 4008 fulfills some objective of foreign policy or national security. No such purpose has been proved. The program instituted by Section 4008 is substantially the same as the administrative program discontinued by President Kennedy on March 17, 1961 after consideration of the national interest in foreign policy and national security. The

legislative history reveals that except for minor differences Section 4008 in effect reinstituted the discontinued program.

For the foregoing reasons this Court is satisfied that the asserted purposes of Section 4008 do not and cannot justify the burden placed on the First Amendment rights of plaintiff and members of the class he represents, and, therefore, we are compelled to declare the statute unconstitutional on its face.

The Court having found that Section 4008 of 39 U. S. C. is unconstitutional on its face, hereby orders that the defendants, their agents and employees be and they are hereby enjoined from executing or enforcing the provisions of the aforesaid statute. Plaintiff shall prepare and submit an appropriate order.

Dated: November 17, 1964.

/S/ HOMER T. BONE,
United States Circuit Judge.

/S/ ALBERT C. WOLLENBERG,
United States District Judge.

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JOHN F. DAVIS, CLERK

No. 491

In the Supreme Court of the United States

OCTOBER TERM, 1964

**CORLISS LAMONT, DOING BUSINESS AS
BASIC PAMPHLETS, APPELLANT**

v.

THE POSTMASTER GENERAL OF THE UNITED STATES

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK**

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

ARCHIBALD COX,

*Solicitor General,
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Washington, D.C., 20530.*

In the Supreme Court of the United States

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THE POSTMASTER GENERAL OF THE UNITED STATES

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THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

On November 17, 1964, a three-judge district court in the United States District Court for the Northern District of California, Southern Division, in a case substantially the same as the present case, held (1) that a suit challenging the constitutionality of 39 U.S.C. 4008 was not rendered moot by the postal authorities' releasing the mail that had been detained pursuant thereto; and (2) that the statute is unconstitutional. *Heilberg v. Fixa*, No. 41660. We have been advised that the appellant intends to file with the Court a copy of the opinion in that case.

In view of the direct conflict between that decision and the present case, the government withdraws its

motion to affirm and agrees with appellant that probable jurisdiction should be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

NOVEMBER 1964.

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Appellant,

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THE POSTMASTER GENERAL OF THE
UNITED STATES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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IN THE
Supreme Court of the United States

October Term, 1964

No. 491

CORLISS LAMONT, doing business as BASIC PAMPHLETS,
Appellant,

v.

THE POSTMASTER GENERAL OF THE UNITED STATES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

Opinions Below

The opinions below (R. 18) are reported at 229 F. Supp. 913.

Jurisdiction

The judgment below (R. 35) was dated and entered on May 19, 1964. Appellant filed a notice of appeal in the Court below on June 17, 1964 (R. 37).

The District Court had jurisdiction under 28 U. S. C. 1331, 1339, 1356, 2201-2202, 2282 and 2284, and under Section 10 of the Administrative Procedure Act, 5 U. S. C. 1009.

Following the filing of a jurisdictional statement in this Court, the Government moved to affirm the judgment

of the District Court. It recognized the substantiality of appellant's constitutional claim on the merits, but argued that in certain respects the action was moot and that in others it was not ripe for adjudication. Appellant filed a brief in opposition. While the Government's motion was pending, a statutory court in the United States District Court for the Northern District of California held that the statute, 39 U. S. C. 4008, was unconstitutional for the reasons urged by the appellant in the present case. *Heilberg v. Fixa* (D. C. N. D. Cal., No. 41660, Nov. 16, 1964), hereinafter cited as *Heilberg*.

Both parties called the *Heilberg* decision to the attention of the Court and the Government withdrew its motion. On December 7, 1964 the Court entered an order noting probable jurisdiction and directed that the issue of mootness be discussed by counsel in their briefs and in oral argument.

Questions Presented

1. Whether 39 U. S. C. 4008 on its face and as applied is unconstitutional because it impairs freedom of expression under the First Amendment to the Constitution, sanctions an unlawful search and seizure under the Fourth Amendment, compels self-incrimination under the Fifth Amendment, and denies due process under the Fifth Amendment.

2. Whether a case is justiciable where the Postmaster General administers the statute by listing appellant as a person requesting "communist political propaganda", with the continuing danger of official use and public disclosure of such lists, where delivery of all unsealed foreign mail addressed to appellant is delayed, and where mail addressed to all other persons whose desire for anonymity precludes lawsuits or requests for mail considered "communist political propaganda" is withheld, even though, upon institution of the present action, the Postmaster General ceased detaining appellant's mail.

Statutes Involved

The principal statute involved is Section 305 of the Postal Service and Public Employees Salary Act of 1962, Public Law 87-793, § 305, October 11, 1962, 76 Stat. 850, 39 U. S. C. 4008 (hereinafter cited as the statute). It provides:

“4008. Communist political propaganda

(a). Mail matter, except sealed letters, which originates or which is printed, or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be ‘communist political propaganda’, shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee’s request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

(b). For the purposes of this section, the term ‘communist political propaganda’ means political propaganda, as defined in section 1(j) of the Foreign Agents Registration Act of 1938, as amended (22 U. S. C. 611(j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to Section 5 of the Trade Agreements Extension Act of 1951 or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended.

(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material whether or not 'communist political propaganda' addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government mails an equal amount of material for delivery in any country described in subsection (b)."

Section 1(j) of the Foreign Agents Registration Act of 1938, 22 U. S. C. 611(j), whose definition of political propaganda is incorporated in 39 U. S. C. § 4008, provides as follows:

"(j) The term 'political propaganda' includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence.

• • • • •

Statement of the Case

In this action, appellant seeks a judgment declaring 39 U. S. C. 4008 unconstitutional and enjoining the enforcement of that statute.

1. Background¹

In 1940, on the basis of an interpretation of the Foreign Agents Registration Act, 39 Ops. Atty. Gen. 535 (1940), the Post Office Department embarked upon a program of seizing and destroying Nazi propaganda upon its receipt in the United States. The program was revived with respect to Communist propaganda in 1951 during the Korean War and was continued after the armistice. By 1956 there had been sufficient protest about the program so that it was modified: an opportunity was thereafter given to addressees, who were notified by postcard that detained mail might be requested. When so requested, the mail was delivered.

On March 17, 1961 President Kennedy issued a directive abolishing the program. In a press release issued simultaneously, the President noted that the step was taken after determination that the program served neither a national security nor an intelligence function, and was injurious to our foreign policy.²

Thereafter several bills were proposed in Congress for the purpose of reimposing restrictions on propaganda

¹ A full historical review of the handling of foreign propaganda in the mails is found in Schwartz and Paul, *Foreign Communist Propaganda in the Mails*, 107 U. of Pa. L. Rev. 621, 796. (hereinafter cited as "Schwartz & Paul").

² Press Release, Office of the White House Press Secretary; March 17, 1961; *New York Times*, March 18, 1961, p. 8. The press release stated, in part:

"Not only has the intelligence value of the program been found to be of no usefulness, but the program also has been of concern to the Secretary of State in connection with efforts to improve cultural exchanges with communist countries."

in the mails. Congressman Cunningham introduced H. R. 9004, 87th Cong. 1st Sess. which would have denied all use of the mails to Communist political propaganda, foreign and domestic. When a comprehensive new postal rate bill came up for consideration early in 1962, it contained the Cunningham proposal, and was passed by the House. At the same time, two measures were presented to the Senate—a bill identical to the Cunningham measure and S. 2740, introduced by Senator Bush, which provided that foreign communist propaganda in the mails be detained and delivered only upon request of the person addressed.

Despite the fact that United States Government representatives and others opposed the bill³, the Senate Post Office Committee reported out H. R. 7927, containing the Bush propaganda proposal, somewhat modified. The Senate report, S. Rep. 2120, 87th Cong. 2d Sess., contained a vigorous dissent by Senator Clark. Despite strong objection by Senator Clark and others on the floor, the bill was passed as reported out, and ultimately enacted as the Postal Service and Federal Employees Act of 1962.⁴ The Act had the effect of reinstating by statute the administrative program which President Kennedy had abolished in March 1961.

2. The Statute

Section 4008 provides that mailed matter, except sealed letters, originating in a foreign country and determined by the Secretary of the Treasury to be "communist political propaganda" is to be "detained" by the Postmaster

³ *Hearings Before the Committee on Post Office and Civil Service of the U. S. Senate on H. R. 7927, 87th Cong. 2d Sess., 827-961.*

⁴ A detailed legislative history is set forth in Schwartz, *The Mail Must Not Go Through*, 11 U. C. L. A. L. Rev. 805, 808-816 (cited hereinafter as "Schwartz"); and in Greenfield, *How We Got Protected from Communist Propaganda*, *The Reporter*, October 26, 1962, p. 22.

General and "delivered only upon the addressee's request", with certain exceptions, and "disposed of" in the absence of a request for delivery. The term "communist political propaganda" is defined by reference to Section 1(j) of the Foreign Agents Registration Act of 1938, as amended, 22 U. S. C. 611(j).

3. The Proceedings Below

Appellant is engaged in the business of publishing and distributing pamphlets and other literature on subjects of public interest (R. 10). In July 1963 he received a notice from the Post Office Department in San Francisco, California, that mail addressed to appellant, consisting of "Peking Review # 12, 1963, 1 copy" was being detained as "Communist political propaganda", pursuant to the statute. The notice advised appellant that unless a specific request was received for the mail, it would be destroyed (R. 10, 13).

Without responding to the notice, appellant brought this action. Thereupon the Acting General Counsel of the Post Office Department wrote to appellant stating that the commencement of the action was deemed to be an expression of appellant's desire to receive such mail and that postmasters at all propaganda screening points were being instructed not to detain appellant's mail (R. 5, 10).

Appellant then served the amended complaint in which he sought a preliminary and permanent injunction enjoining the carrying out or enforcement of the statute and directing the removal of appellant's name from all lists and records kept by the Postmaster General of persons desiring to receive "communist political propaganda", and a declaratory judgment that appellant is entitled to receive mail without complying with the statute, and that the statute is unconstitutional (R. 1).

Appellant moved, prior to service of an answer, for the convening of a three-judge court and for summary

judgment (R. 6). A statutory court was convened. It denied, one judge dissenting, appellant's motion for summary judgment and dismissed the amended complaint (R. 35).

4. Opinions of the District Court

A majority of the District Court held that the issues were moot because the appellant's mail was no longer being detained; that the maintaining of appellant's name on lists of persons desiring political propaganda did not present a question ripe for determination in the absence of actual disclosure; and that the appellant had no standing to challenge the statute on behalf of other persons.

The dissenting opinion of District Judge Feinberg concluded that appellant's claim was ripe in view of the possibility of disclosure and the probable lack of opportunity to raise the issue before the injury occurred. Judge Feinberg was of the opinion that the issues were not moot since the delivery of the mail to appellant did not vitiate the existence of the lists, the effect of which presented justiciable issues. The dissent also reasoned that appellant should be permitted to challenge the statute on behalf of other persons. In addition, Judge Feinberg questioned the Government's policy of mooting all actions attacking the statute, particularly since First Amendment rights were involved.

Summary of Argument

I.

On many occasions this Court has affirmed under the First Amendment the broad right to distribute literature. The right to receive is included in the scope of the protection because receipt furthers the primary policies underlying the Amendment—the attainment of truth and widespread participation in decision making. That the material in question may be described as “communist political

propaganda" is not pertinent for "the Constitution protects expression and association without regard * * * to the truth, popularity or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U. S. 415, 444-45. Likewise, it is clear that the congressional power over the mails is not absolute but is limited by the full reach of the First Amendment.

A. The statute establishes the kind of governmental licensing scheme that has consistently been declared invalid in this Court as a restraint on free expression. It authorizes an official to hold up mail while he makes a necessarily imprecise judgment as to whether it is "communist political propaganda" and, if he determines that it is, to await the response of the addressee to his inquiry as to whether delivery is desired. Second, the statute interferes with First Amendment rights by conditioning the release of mail upon the addressee's expression of a "desire" to receive it. Such a condition raises the distinct possibility that literature will not be delivered, either because the addressee may not go to the trouble of requesting it or because he feels an inevitable inhibition about advising the Government that he desires "communist political propaganda."

B. In a series of cases the Court has afforded constitutional protection to those seeking to maintain anonymity in the face of threatened disclosure of identity that would impair rights protected by the Bill of Rights. In this case it is plain that the listing procedure established under the statute is invalid because it exposes persons listed to governmental and private reprisals. The list has the attributes of a "blacklist", and indeed information about individuals on it has been turned over to congressional investigating committees. The fact of desiring communist propaganda also might be considered evidence of Communist Party or communist-front membership under the Internal Security Act of 1950, and, because of the substantial possibility of publicity, opens the door to widespread

opprobrium for those listed. In view of these facts, the court below turned its back on reality in finding that classification as a person listed "need not connote disapprobation." The court below also erred in its conclusion, based largely on an affidavit of the Postmaster General, that disclosure of the persons listed was unlikely. The affidavit itself is equivocal, and there is no assurance at all from customs officials, who administer the program and were responsible for past disclosures. The procedure under the statute is not materially different from the earlier administrative program under which disclosures took place. And even if there were only a small chance of disclosure, there would be a substantial inhibiting effect on free expression because large numbers of persons—not merely the timid—will refrain from taking a step which in any way identifies them as desiring communist propaganda.

C. Under the correct constitutional standard, which places First Amendment rights beyond abridgment, there is no possible justification for the statute. Nor is there any "paramount interest" present which might justify the dual restraints on free-expression created by Section 4008. Even if the Court evaluates the statute under the more elastic "balancing test," the result must be the same because no proper state interest has been shown that would remotely suffice to justify the severe encroachment on protected liberties. The real purpose of the statute was to discourage the dissemination of political ideas, a wholly impermissible goal that may play no role even in the broadest of balancing tests.

D. It is now beyond dispute that the Congress may not employ means more drastic than necessary to achieve its purposes when the result is impairment of free expression. Even assuming that Section 4008 had some proper legislative end involving the protection of Americans from an influx of "communist political propaganda," it is plain that less drastic alternatives are available, such as the

bill proposed by the late Congressman Walter, that would achieve this end without the vast encroachments sanctioned by the statute.

II.

The term "communist political propaganda," as defined by reference to Section 1(j) of the Foreign Agents Registration Act of 1938, is an unconstitutionally vague standard by which officials are required to determine whether incoming literature is to be withheld from the addressee. The Registration Act defines political propaganda as any communication adapted to or intended to influence the public (i) with reference to the political or public interests, policies or relations of a government of a foreign country or a foreign political party, or (ii) with reference to the foreign policies of the United States, or (iii) which promotes in the United States racial, religious or social dissension, or (iv) which advocates, advises, instigates or promotes any racial, social, political or religious disorder, civil riot or other conflict involving the use of force or violence in any other American republic.

All four of these clauses are impermissibly vague under the governing criteria repeatedly laid down by this Court. None of them affords adequate guidelines to those entrusted with the administration of the program, particularly in view of the danger to First Amendment liberties presented by potentially free-wheeling interpretations. There is no limit to utterances, in these days of social ferment, that may promote "racial, religious or social" dissension or disorder within the meaning of clauses (iii) and (iv). And even if the vagueness of these clauses is cured by a generous reading of the condition in clause (iv) that the propaganda must advocate "the use of force or violence," no such curative possibility exists for clauses (i) and (ii). Under their expansive criteria officials are free to indulge in the broadest interpretations of "communist political propaganda," thus realizing the fears for freedom of ex-

pression that led the Kennedy Administration to oppose enactment of the statute.

III.

Even if the statute is found not to infringe upon protected First Amendment rights by authorizing the detention of mail and listing persons expressing a "desire" to receive "communist political propaganda", the statute violates the due process clause of the Fifth Amendment in sanctioning these administrative determinations abridging basic rights without providing notice, hearing, and right of appeal on the question whether seized literature is in fact "communist political propaganda." It is well established that "the procedures by which the facts of the case are adjudicated are of special importance" when the government curtails free expression. *Speiser v. Randall*, 357 U. S. 513, 521. In the instant case, despite the substantial impairments of free expression, there is no mechanism whereby the addressee of detained mail is permitted to litigate, with proper procedural safeguards, the underlying factual questions involved. The decision below thus is in conflict with *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, which ruled that the Attorney General was barred by the Fifth Amendment from preparing lists, similar to those in the present case, without proper procedural safeguards.

IV.

There is no justification for the invidious discrimination contained in the statute between those addressees, such as government agencies, universities and other institutions, that are permitted unrestricted access to mail, and all other persons, including writers, editors and the ordinary citizen, who are required to express a "desire" to receive mail that is found to be "communist political propaganda." Because this discrimination unjustifiably subordinates the citizen's legitimate quest for information to institutional recipients,

it is in violation of the due process clause of the Fifth Amendment, which prohibits the federal government from making arbitrary classifications. The only possible reason for the classifications contained in Section 4008 is that "communist political propaganda" is too dangerous for the average American to handle, but this reason cannot suffice because it is fundamentally inconsistent with the constitutional purpose to protect expression of every variety without regard to its popularity or social utility.

V.

The statute violates both the Fourth and Fifth Amendments because it sanctions an unreasonable search and seizure and requires the would-be reader to incriminate himself. As in *Boyd v. United States*, 116 U. S. 616, where the Court recognized the "intimate relation between the two amendments," the addressee is improperly put to a Hobson's choice. He is forced by the statute to choose between possible incrimination under the listing procedure and the alternative of forever foregoing the opportunity to receive mail addressed to him. Nor can the search be justified by its nature and purpose. Only in cases involving the use of the mails for criminal purposes—a possibility wholly absent here—have detentions of mail been countenanced. The right of privacy protected by the Fourth Amendment should be protected with particular care because the search under the statute is unlimited in scope and directed at the political content of the mail.

VI.

Contrary to the decision below, the present action is neither moot nor unripe for adjudication, and appellant has standing to raise the constitutional questions presented both in his own right and as representative of third parties.

A. Appellant's claim challenging the detention of mail by the Postmaster General is not moot because, although he

is now listed as entitled to receive literature addressed to him, his mail is subject to considerable interference and delay which is not capable of being cured under the procedures established under the statute.

B. Appellant's claim challenging the listing procedure is not premature because there is no solid basis for the conclusion that the lists containing his name will be kept out of the hands of officials or members of the public who would take action against or stigmatize him. There is nothing hypothetical about the danger that the lists will be delivered to government agencies or disseminated publicly in view of the past practices of those maintaining lists, the equivocal affidavit filed by the Postmaster General, and the political realities of the listing process. The court below misconstrued the ripeness doctrine, failing to recognize its lack of rigidity and the application of the rule which calls for adjudication on the merits in cases where, as here, there is substantial likelihood of harm to the person raising constitutional issues.

C. Appellant has standing to represent third parties in challenging both the detention of mail and the listing procedure. He is the "only effective adversary" in a case against the Postmaster General, *Barrows v. Jackson*, 346 U. S. 249, 255-59, and in view of the plain abridgement of his First Amendment rights in two distinct ways, he is "an appropriate representative" of a class of persons loath to assert their rights openly because of the harm that would follow loss of anonymity. *NAACP v. Alabama*, 357 U. S. 499.

The instant case presents the strongest possible occasion for adjudication on the merits because fundamental constitutional liberties are involved that will, if appellant is denied standing, be permanently immunized from judicial review by the Government's deliberate and ingenious practice of treating the filing of a lawsuit challenging the statute as tantamount to a request for immediate delivery of communist political propaganda.

ARGUMENT

POINT I

The statute impairs freedom of expression.

The broad right to distribute literature, protected by the First Amendment, has been affirmed in this Court on many occasions. In *Martin v. Struthers*, 319 U. S. 141, which declared invalid an ordinance prohibiting door-to-door distribution of handbills, the Court stated at 143:

The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, *Lovell v. Griffin*, 303 U. S. 444, 452, and necessarily protects the right to receive it. * * *

The right to receive information is included in the scope of the protection because the receipt of information furthers the primary policies embedded in the Amendment, those described by Professor Thomas I. Emerson as the public's attainment of truth and widespread participation in decision-making. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877, 881-884. That the rights have generally been vindicated by the efforts of distributors does not detract from the fact that an essential concern of the Amendment is for the recipient.

The importance of the First Amendment in our society and its preferred constitutional position have been reiterated again and again in decisions of the Court. Mr. Justice Stewart described the protected rights as being "at the foundation of a government based upon the consent of an informed citizenry * * *." *Bates v. Little Rock*; 361 U. S.

516, 522-523. And in a classic statement, the Court in *Thornhill v. Alabama*, 310 U. S. 88, 101-02, carefully explained the reasons for the preferred status of the First Amendment:

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. * * * Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

That the material in question may be described as "communist political propaganda" does not derogate from the individual's right to receive it, for "the Constitution protects expression and association without regard * * * to the truth, popularity or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U. S. 415, 444-45. There is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times v. Sullivan*, 376 U. S. 254, 270.

The mails are of course subject to the control of Congress, under Article I, section 8 of the Constitution, and some of the earlier cases either held or suggested that this congressional power was not limited by the First Amendment. That view is no longer tenable. Thus, " * * * Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if

directly attempted would be unconstitutional.” *Speiser v. Randall*, 357 U. S. 513, 518. See also *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 155-156. The theory of the absolute and unfettered power over the mails was expressly rejected in Mr. Justice Harlan’s separate opinion in *Roth v. United States*, 354 U. S. 476, 504n:

The hoary dogma of *Ex parte Jackson*, 96 U. S. 727, and *Public Clearing House v. Coyne*, 194 U. S. 497, that the use of the mails is a privilege on which the Government may impose such conditions as it chooses, has long since evaporated. See Brandeis, J., dissenting, in *Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407, 430-433; Holmes, J., dissenting, in *Leach v. Carlile*, 258 U. S. 138, 140; *Cates v. Haberland*, 342 U. S. 804, reversing 189 F. 2d 369; *Door v. Donaldson*, 90 U. S. App. D. C. 188, 195 F. 8d 764.

A. The statute is invalid because in effect it establishes an unconstitutional licensing system that abridges the free delivery of the mails.

It is well established that registration and licensing as conditions for the distribution of literature are invalid under the First Amendment. In *Lovell v. Griffin*, 303 U. S. 444, in striking down a municipal ordinance forbidding the distribution of literature without first obtaining written permission from the City Manager, the Court said at page 451:

Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his ‘Appeal for the Liberty of Unlicensed Printing.’ And the liberty of the press became initially a right to publish ‘without a license what formerly could be published only with one.’ (Emphasis in original.)

See also *Schneider v. State*, 308 U. S. 147; *Jamison v. Texas*, 318 U. S. 413. The broad principle reflected by these cases, that governmental licensing is wholly inconsistent with the First Amendment, has been applied to similar restraints on a person scheduled to make a speech, *Thomas v. Collins*, 323 U. S. 516, and to a 2% license tax on newspaper advertising revenue, *Grosjean v. American Press Co.*, 297 U. S. 233.

The statute here establishes the kind of governmental registration and licensing scheme that has consistently been declared invalid by this Court. Pursuant to the statute, an official in the bureaucracy seizes incoming literature, makes a determination as to whether it falls within the vague standard of "communist political propaganda", then writes the addressee inquiring whether the mail is desired, and delivers it only upon such an expression of desire.

The restraints on freedom of speech are plain. First, there is the inevitable delay while a Government official inspects the mail, makes a necessarily imprecise judgment about it, writes the addressees, and then awaits a response before dispatching it. The hand of officialdom is present at every step. Just as the licensing authority in the *Lovell*, *Schneider* and *Jamison* cases controlled the flow of ideas to the public, so here the Government regulates the transmittal of mail to addressees throughout the United States.

A second and more serious obstacle that the statute poses to the exercise of First Amendment rights arises out of the fact that unless the addressee of literature expresses a "desire" to receive it, the mail is never delivered. Quite apart from the consequences of listing individuals who express such a "desire" to receive "communist political propaganda" (which will be treated in Section B below), there is an obvious restraint on the free flow of mail by so conditioning its release. There is a substantial possibility

that the mail will not be delivered. First, the addressee must go to the trouble of requesting the mail—an affirmative obligation which the Government may not constitutionally impose upon the citizen. In addition, the addressee is bound to feel some inhibition about dealing with the Government on an issue as sensitive as the receipt of alleged “communist political propaganda.” If a man must be a martyr, or thinks that he may be one, before being allowed by the Government to read what is sent to him through the mails, the people surely do not enjoy the “uninhibited, robust, and wide-open” debate contemplated by the First Amendment. *New York Times v. Sullivan*, 376 U. S. 254, 270.

B. The statute is invalid because the listing procedure established under it impairs protected rights of anonymity by exposing those listed to governmental and private reprisals.

In a series of cases over the past decade the Court has afforded constitutional protection to those seeking to maintain anonymity in the face of threatened disclosure of identity that would impair rights protected by the Bill of Rights. It is difficult to imagine a case in which the loss of anonymity is more likely to lead to injury than the present one and where that injury is more directly related to the exercise of liberties safeguarded by the First Amendment.

In *NAACP v. Alabama*, 357 U. S. 449, and *Bates v. Little Rock*, 361 U. S. 516, the Court protected the important interest underlying anonymity by refusing to countenance the enforced disclosure of membership lists where it appeared likely that injury would flow from the loss of anonymity. And in *Talley v. California*, 362 U. S. 60, the Court invalidated an ordinance requiring that handbills show the name of the distributor, saying at page 64, “There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information

and thereby freedom of expression." See Note, *The Constitutional Right to Anonymity*, 70 Yale L. J. 1084.⁵

The instant case falls squarely within the principle underlying these decisions and is indeed a much stronger occasion for its application. In the first place, as the statutory court said in *Heilberg*: "If identification of a distributor is constitutionally impermissible, *a fortiori*, identification of a recipient, whose rights are similarly protected [See *Martin v. Struthers*, 319 U. S. 141 (1943)], would no less 'tend to restrict * * * freedom of expresion' " Second, there is far more justification for the fear of loss of anonymity here than in *Talley*, where there was little objective showing of harm that was likely to follow from enforced disclosure of identity.

The primary danger inherent in maintaining lists under Section 4008 becomes plain in the light of the history of the screening process before the enactment of the statute. During that period of enforcement, information about individuals that was obtained by executive agencies was routinely turned over to congressional committees, which on several occasions used it in interrogating witnesses. The authors of the most comprehensive study of the program, observing this pattern, commented on the "close

⁵ "In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority. It cannot require argument that inquiry would be barred to ascertain whether a citizen had voted for one or the other of the two major parties." *Sweezy v. New Hampshire*, 354 U. S. 234, 266 (Frankfurter, J. concurring).

liaison between the Un-American Activities Committee and enforcement officials." Schwartz and Paul, 631.⁶

But the potential injury to those seeking to receive what an official considers "communist political propaganda" is not limited to the excesses of congressional committees. The lists established pursuant to the statute have many of the "blacklist" attributes of the Attorney-General's list of subversive organization, see *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, and like it can be used to probe the reading habits of Americans under investigation by loyalty and security boards concerned with employees of the government, government contractors, and international organizations. See Report of the Special Committee on the Federal Loyalty Security Program of the Association of the Bar of the City of New York (1956). The fact of desiring communist propaganda also might be considered evidence of Communist Party membership or of Communist Front membership under the Internal Security Act of 1950; for example, in proceedings before the Subversive Activities Control Board, literature regarded as communist propaganda has furnished a con-

⁶ Frank acknowledgment of disclosure of the recipients of "communist propaganda" is found in the transcripts of many congressional hearings. For example: *Investigation of Communist Propaganda in the United States—Part I*, Hearings, House Committee on Un-American Activities, 84th Cong., 2d Sess., June 13, 1956, p. 4714; *Communist Infiltration & Activities in the South*, Hearings, House Committee on Un-American Activities, 85th Cong., 2d Sess., July 29, 30 and 31, 1958, p. 2641; *Communist Propaganda—Part 9 (Student Groups, Distributors & Propaganda)*, Hearings, House Committee on Un-American Activities, 85th Cong., 2d Sess., June 11 and 12, 1958, p. 2433; *Communist Infiltration and Activities in Newark, N. J.*, Hearings, House Committee on Un-American Activities, 85th Cong., 2d Sess., Sept. 3, 4 and 5, 1958, p. 2794; *Communist Political Propaganda and Use of United States Mails, Part 2*, Hearings, Subcommittee to Investigate the Administration of the Internal Security Act, etc., of the Senate Committee of the Judiciary, 87th Cong., 1st Sess., p. 56.

siderable part of the evidence against the respondent organizations.⁷

Not only does the maintenance of such lists open the door to official sanctions, but the possibility of their becoming public, whether by congressional committees as in the past or otherwise, makes public opprobrium likely. For this reason opponents of the legislation in the Senate were properly concerned about the stigma that would attach to persons requesting such literature. See Sen. Rep. 2120, 87th Cong. 2d Sess., p. 44 (individual views of Senator Clark).⁸ As Judge Feinberg, dissenting, stated below (R. 32):

* * * [W]hether classification as a person desiring to receive communist political propaganda need connote public disapprobation is irrelevant, since it ordinarily does so connote, and social ostracism flows from this. Cf. *Grant v. Reader's Digest Ass'n*, 151 F. 2d 733, 735 (2 Cir.), cert. denied, 326 U. S. 797 (1946). (Emphasis in original.)

In view of this recent history, the court below turned its back on the realities of contemporary life in finding that "classification as a person desiring to receive communist political propaganda * * * need not connote disapprobation." In reaching this surprising conclusion the

⁷ See, e.g., *Communist Party v. Subversive Activities Control Board*, 367 U. S. 1; *Veterans of the Abraham Lincoln Brigade v. Subversive Activities Control Board*, 331 F. 2d 64, certiorari granted, 377 U. S. 989; *American Committee for the Protection of the Foreign Born v. Subversive Activities Control Board*, 331 F. 2d 53, certiorari granted, 377 U. S. 915.

⁸ Senator Clark said on the floor of Congress: "Those who ask to have such Communist propaganda delivered to them will have it delivered to them, but their names will be placed on a list. My guess is that that would not be particularly good for their reputation in the climate of opinion prevailing in certain areas of our country." 108 Cong. Rec. 20843. Senator Yarborough pointed out that even the addressees who did not request this literature might be adversely affected. 108 Cong. Rec. 20845.

court relied on the statutory exemptions for "reputable organizations and individuals [who] may receive communist political propaganda without any disgrace attaching." (R. 25).

But the statutory exemptions suggest precisely the opposite conclusion: anyone who is not within any of the exempt (*i. e.*, reputable) classes has no proper reason to read propaganda and is therefore suspect. Recognizing these facts, the *Heilberg* court found that "the social stigma and economic injury they may suffer is very real." Or, as Mr. Justice Douglas said in his concurring opinion in *United States v. Rumely*, 345 U. S. 41, 58: "If the lady from Toledo can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in libraries, bookstores and homes of the land."

The Postmaster General attempted to counteract the above facts by filing an affidavit submitted in response to allegations in paragraph 8 of appellant's complaint that information on the lists maintained under the screening program has been or is likely to be made public (R. 2). The affidavit states in pertinent part (R. 16):

"2. One of the points covered in the establishment of each Propaganda Unit was an instruction that the file kept on addressees to whom propaganda had been sent would not be made public and that no part of this file could be released to any person, U. S. government agency or other group, except with express permission from Post Office Department headquarters in Washington.

The court below interpreted the affidavit as evidencing "a solicitous regard for the confidentiality of this information", and felt that "the change in administration and the material differences between the two programs [pre-statutory and statutory]" (R. 26) was sufficient to dispose of the claim that disclosure was likely to continue.

But this conclusion is without basis in fact. In the first place; it is an erroneous reading of the affidavit, which at best is equivocal and thereby suggests strongly that past practices will continue—as would any response but a categorical undertaking to maintain the lists in complete secrecy. Second, there is no material difference between the two programs. They are essentially identical, and however policies of the executive branch may have changed with the advent of a new administration in 1961, the powers and policies of the congressional committees continue as before.

Furthermore, the conclusion of the Court below is dubious as a practical estimate of the consequences of listing because, even if a good faith effort were made to keep the lists confidential, the risk of disclosure would be great. Not only is there no assurance from customs officials, who administer the program and who were responsible for past disclosures, but the lists are permanent, while administrations and policies change. As the court in *Heilberg* stated:

Assurances by defendant that these practices have been discontinued cannot be reasonably expected to mitigate a person's reluctance to have his name associated with 'communist political propaganda.' There are no similar assurances that this information will not be made available in the future in view of the lack of statutory requirement that information received pursuant to Section 4008 remains confidential.

But even if the risk of disclosure were less than it patently is, the deterrent effects of listing all those who express a desire to receive "communist political propaganda" are bound to be severe. The ordinary citizen does not know whether such lists have ever been made public in the past or may be in the future. Nor can he know whether the Government will use the lists to prejudice him. Certainly the notice sent to addressees (R. 13) contains no assurance of

anonymity. In our contemporary political society, where loyalty and security programs affect millions of governmental and non-governmental employees, it can safely be assumed that large numbers of persons—not merely the timid—will refrain from taking a step which in any way identifies them as having an interest in “communist political propaganda.”

C. There is no justification for the significant infringement of freedom of expression by the statute.

Under the appropriate constitutional standard “First Amendment rights are beyond abridgement either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation or exposure by government.” *Bates v. Little Rock*, 361 U. S. 516, 528 (Justices Black and Douglas, concurring). Or as the Court recently stated, “It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, ‘[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,’ *Thomas v. Collins*, 323 U. S. 516, 530.” *Sherbert v. Verner*, 374 U. S. 398, 406. See also *Barenblatt v. United States*, 360 U. S. 109, 134 (Justice Black, dissenting); *Konigsberg v. State Bar of California*, 366 U. S. 36, 56 (Justice Black, dissenting).

Under this standard Section 4008 is clearly invalid under the First Amendment. It imposes a direct restraint on free expression, both as a licensing mechanism and through enforced disclosure of all those desiring “communist political propaganda.” And there are hardly the kind of “paramount interests” present that would justify any limitation of these principles.⁹ Accordingly, under the

⁹ Adequate statutory authority already exists for coping with any true emergency. 18 U. S. C. 1717 provides criminal sanctions for the mailing of matter which is treasonous or insurrectionary, and 19 U. S. C. 1305(a) prevents its importation from abroad.

appropriate constitutional standard, the decision below should be reversed.

Even if the Court evaluates the constitutionality of Section 4008 according to a more permissive standard, whether by a "balancing test" or similar criterion, the result should be the same because no state interest has been shown that would remotely suffice to support the encroachment of First Amendment rights under Section 4008.

Various justifications have been offered at times, including the saving of the taxpayer's money, the benefit to American foreign policy, and the protection of persons from receipt of Communist propaganda. But no facts have been offered that tend to support these contentions. As the *Heilberg* court concluded "[the Government's] interests, while 'compelling' in theory, are insubstantial, illusory in fact and ignore available alternatives."¹⁰

Indeed, a reading of the legislative history makes it abundantly clear that the sole purpose of the statute was to discourage the dissemination of matter which Congress felt to be politically offensive. Representative Cunningham's original proposal was to prohibit flatly the mailing of all Communist propaganda, and the statute as finally enacted is popularly known as the Cunningham Amendment. That the sole purpose of Section 4008 was to discourage the dissemination of political opinion is made evident from Mr. Cunningham's remarks upon its passage:

Like the House version I want to say that this amendment in the conference report is a very strong and worthwhile amendment to stop the free delivery of Communist propaganda in the United States postal system. In my opinion it will stop at least 95 percent of Communist political propaganda from being delivered in the United States. It is going to

¹⁰ In fact, the program may be positively harmful. At least this seems the thrust of President Kennedy's statement of March 17, 1961. See note 2, *supra*.

be easily administered; it is going to stop this vicious material from coming into this country and being delivered free. *Section 305 of the conference report accomplishes the same thing as would Section 12 in the House-passed version.* (108 Cong. Rec. 22601 (1962)) (emphasis added)

And in the Senate debate, Senator Johnston, the committee chairman, described the bill as one "to blot out the delivery of communist political propaganda through the U. S. mails" (108 Cong. Rec. 20986).

However compelling the legislators found this purpose to be, it is precisely what the First Amendment prohibits, and it may play no role even under the broadest of balancing tests. The Constitution has no favorites in the world of thought. See *NAACP v. Button*, *supra*.

In sum, even under the so-called "balancing" test that permits incursion on freedom of communication, there is no valid justification for the severe encroachments that occur pursuant to Section 4008.

D. The statute is invalid because it stifles freedom of expression more broadly than necessary in the light of available alternative means of achieving the legislative purpose.

It is now beyond dispute that the Congress may not employ means more drastic than necessary to achieve its purposes when the result is broad impairment of free expression. As the Court said in *Shelton v. Tucker*, 364 U. S. 479, 488:

[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

The principle of the *Shelton* case was recently applied in *Aptheker v. Rusk*, 378 U. S. 500, where the Court invalidated

"broad travel restrictions on members of the Communist Party imposed by Section 5 of the Subversive Activities Control Act. Noting that "Congress [had] within its power 'less drastic' means of achieving the congressional objective of safeguarding our national security," 378 U. S. at 512-13, the Court went on to say at 514:

The section therefore is patently not a regulation 'narrowly drawn to prevent the supposed evil', cf. *Canwell v. Connecticut*, 310 U. S. at 307, yet here, as elsewhere, precision must be the touchstone of legislation so affecting basic freedoms, *NAACP v. Button*, 371 U. S. at 438.

See also Freund, *Competing Freedoms in American Constitutional Law*, 13 U. of Chicago Conference Series 26, 32-33; Richardson, *Freedom of Expression and the Function of Courts*, 65 Harv. L. Rev. 1, 6, 23-24.¹¹

Even assuming some proper legislative end that involves protecting Americans from an influx of "communist political propaganda," it is plain that "less drastic" alternatives are available that would achieve this goal without the vast encroachment on freedom of expression sanctioned by Section 4008.

The simplest alternative is embodied in the recommendation of the late Congressman Walter, who introduced H. R. 5751, 87th Cong. 1st Sess. (reported out with H. Rep. 309, 87th Cong. 1st Sess.). Mr. Walter, who was not noted for his friendly attitude towards communism, was satisfied with a bill which, as reported out, merely would have authorized the Postmaster either to place notices in post offices informing the public or notify recipients directly that communist propaganda in quantity was being sent through the mails. The bill provided that in cases where

¹¹ Even in the constitutionally less sensitive area of regulation of interstate commerce, the Court has scanned statutory restraints with a weather eye and has invalidated oppressive local regulation where "reasonable and adequate alternatives are available." *Dean Milk v. Madison*, 340 U. S. 349, 354.

recipients decided on their own initiative that such propaganda was unwanted, it could be returned to the post office free of charge. If Congress believes that a problem warranting legislative action exists, it is obvious that the Walter proposal is a far more careful and less dangerous means of achieving that goal than Section 4008. Indeed the existing post office regulations already contain an effective remedy. 39 C. F. R. 44.1(a) provides that any person may authorize the postmaster to withhold the delivery of specifically described classes of foreign printed matter and to substitute his judgment as to classification for that of the addressee.

Undoubtedly there are other ways that Congress could, if it wishes, deal with "communist political propaganda." The one clear fact is that the method chosen is impermissible because it, "broadly stifle[s] fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U. S. 479, 488.

POINT II

The statute is void because the term "communist political propaganda" is unconstitutionally vague and there are no adequate standards to guide those charged with its administration.

The term "communist political propaganda" in Section 4008 means political propaganda as defined in Section 1(j) of the Foreign Agents Registration Act of 1938, as amended, 22 U. S. C. 611(j), issued by or on behalf of certain countries, particularly those in the Communist bloc.¹²

¹² That is, those "with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951 or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended."

Section 1(j) of the Foreign Agents Registration Act defines political propaganda as any communications adapted to or intended to influence the public

(i) "with reference to the political or public interests, policies or relations of a government of a foreign country or a foreign political party"

or

(ii) "with reference to the foreign policies of the United States"

or

(iii) "to promote in the United States racial, religious or social dissensions" [sic]

or

(iv) "which advocates, advises, instigates or promotes any racial, social, political or religious disorder, civil riot or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by means involving the use of force or violence * * *."

Under the governing criteria repeatedly laid down by this Court, Section 4008 is invalid as impermissibly vague. The statute demonstrably falls within the class of cases which have held that a statute violates due process when it is in "terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application * * *." *Connally v. General Construction Co.*, 269 U. S. 385, 391. See also *Lanzetta v. New Jersey*, 306 U. S. 451, 453; *United States v. Cardiff*, 344 U. S. 174, 176.

The present statute is one of those where the "vice of unconstitutional vagueness is further aggravated [because it] operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Cramp v. Bd. of Public Instruction*, 368 U. S. 278, 287. See also *Baggett v. Bullitt*, 377 U. S. 360; *Smith v. California*, 361 U. S. 147, 151; *Stromberg v. California*, 283 U. S. 359, 369.

The above decisions involved statutes where the individual was "required at peril of life, liberty or property

to speculate as to the meaning of penal statutes," *Lanzetta v. New Jersey, supra*, or to guess at the meaning of vague oaths required of employees "at the risk of subsequent prosecution for perjury, or . . . immediate dismissal from public service." *Cramp v. Bd. of Public Education*, 368 U. S. at 285.

In the present case it is a government official who must reckon with the vague words of Section 4008. Accordingly, the statute here is invalid under the rulings of this Court that prohibit an overbroad and imprecise delegation of legislative power to officials of the executive branch. Section 9(c) of Title I of the National Industrial Recovery Act, which authorized the President "to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof," was struck down because it provided no precise guidelines. *Panama Refining Co. v. Ryan*, 293 U. S. 388. And Section 3 of the NIRA was likewise invalidated because it gave the President unbounded discretion to approve binding "Codes of Fair Competition" in certain industries without clarifying just what "Fair Competition" was or how it was to be determined. *Schechter Poultry Corp. v. United States*, 295 U. S. 495.

The loose standards set out in Section 1(j) of the Foreign Agents Registration Act, which defines "communist political propaganda," are equally inadequate as criteria for official action. Indeed, they are more clearly invalid than the statutes in either the *Panama Refining* or *Schechter Poultry* cases because the latter presented no threat to the preferred freedoms guaranteed by the First Amendment. In the instant case, the danger to First Amendment liberties is intense because a member of the bureaucracy is given the authority to determine, on the basis of his view of the fluid terms of Section 1(j), whether mail will be delivered to the person to whom it is addressed. In such circumstances, the protections afforded by the doctrine prohibiting vague delegations to the executive branch are or should be

correspondingly greater, just as the doctrine which prohibits imprecise penal statutes has been applied with special vigor on occasions in which fundamental freedoms are jeopardized. See e.g., *Winters v. New York*, 333 U. S. 507; *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495; *Cramp v. Bd. of Public Instruction*, *supra*; *Baggett v. Bullitt*, *supra*; see generally Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. of Pa. 67.

The four clauses of Section 1(j) noted above are impermissibly vague. Taking the clauses we have numbered (iii) and (iv) first, what are the bounds, in these days of social ferment, of propaganda that promotes "racial, religious or social" dissension or disorder? Virtually every statement on a public issue has the tendency to arouse one group or another that may feel its interests are threatened. Any comment about conflicts between Greeks and Turks, Arabs and Jews, unions and management, tends to, and indeed has, stimulated "dissension" or "disorder." It would be difficult to imagine terms more expansive in meaning or so prone to over-generous application.

It might be said that clause (iv) above, and perhaps even clause (iii) are qualified by the condition in clause (iv) that the propaganda advocates "the use of force or violence in any other American republic or the overthrow of any government" Such a reading, particularly with respect to clause (iii), seems unjustified by the plain language of the statute. Moreover, even these terms of condition are hardly precise, and it is difficult to understand how a vague condition can cure the vice of an even vaguer statutory definition.

But assuming that clauses (iv) and (iii) are made sufficiently precise by a strained reading, it seems inconceivable that clauses (i) and (ii) are valid as providing adequate guidelines to officials entrusted with the statutory responsi-

bility of screening and holding up mail addressed to persons within the United States.

What exactly does it mean to influence the public "with reference to the political or public interests, policies or relations" of a foreign government or foreign political party? And what could be a more fluid concept than influencing the public "with reference to the foreign policies of the United States?" There would seem to be little or nothing that is published by anyone that does not arguably fall within these categories, and yet they are the criteria by which officials are to decide what persons in the United States are to be permitted to read without restraint.

Recognizing these infirmities, the Kennedy Administration opposed the Cunningham Amendment on the ground that the definition of "communist political propaganda" was overly vague. President Kennedy wrote that the bill "does not give the Attorney General very clear guidance as to what he is supposed to label communist and political propaganda," and he suggested that the Senate "should examine the language very clearly and make sure that it is effective and is responsive to our national needs, and determine whether the generalized instructions to the Attorney General fall within the necessity of legal precision."¹³

That the statute is unduly vague is clear not only from its language and legislative history, but also from the evidence available concerning administrative enforcement of the foreign censorship program which antedated Section

¹³ 108 Cong. Rec. 20845, 20846. The Attorney General also was of the opinion that the definition in the Foreign Agents Registration Act was too vague for use in such a statute. Hearings before the Senate Committee on Post Office and Civil Service on H.R. 7927, 87th Cong., 1st Sess., p. 830. The Treasury Department agreed.

Senators opposed to the bill likewise noted its vagueness. See Senator Clark's individual views in Sen. Rep. 2120, pp. 42-43 and in 108 Cong. Rec. 20843, 20844.

4008. As the two leading commentators on the subject have noted:

The criteria for propaganda are so broad that enforcement officials in the field were able to find suspect matter in Soviet published works on art, religion, philosophy, 19th Century literature and even so apolitical a subject as 'Chess for Beginners'. Schwartz and Paul, 633, quoted in 108 Cong. Rec. 20640.

Accordingly, the term "communist political propaganda" is in violation of the due process clause of the Fifth Amendment because it provides no valid standards to guide the administrative officials charged with its enforcement.

POINT III

The statute denies appellant procedural due process because it authorizes administrative determinations abridging basic rights without notice, hearing or right of appeal.

We have already demonstrated that Section 4008 impermissibly infringes upon freedom of speech by authorizing the detention of mail and the maintenance of official lists of persons who have expressed a "desire" to receive "communist political propaganda." Even if the statute is found not to be inconsistent with the protections afforded by the First Amendment, it is violative of the due process clause of the Fifth Amendment because it sanctions these administrative determinations abridging basic rights without providing notice, hearing, and right of appeal on the question whether seized literature is in fact "communist political propaganda."

It is well established that "in the development of our liberty insistence upon procedural regularity has been a large factor." *Burdeau v. McDowell*, 256 U. S. 465, 477

(Justice Brandeis dissenting). Accordingly, notice and hearing are prerequisite to due process not only in criminal actions, e.g., *In re Oliver*, 333 U. S. 257, 273, but also in civil proceedings. E.g., *Coe v. Armour Fertilizer Works*, 237 U. S. 413; *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292.

These protections are, of course, of special importance when constitutional liberties are threatened. Thus, in *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 66, the Court said: "[T]he Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line." See also, *A Quantity of Copies of Books v. Kansas*, 378 U. S. 205; *Marcus v. Search Warrant*, 367 U. S. 717.

Surely if procedural safeguards are required in cases involving allegedly obscene literature, which may turn out to be speech unprotected by the First Amendment, see *Roth v. United States*, 354 U. S. 476, such protections are all the more called for where, as here, there is no doubt that First Amendment rights are infringed by the establishment of lists that impede the uninhibited exchange of ideas.

That Section 4008 is invalid under the due process clause for failing to provide even minimal protection to those who wish to exercise their constitutional right to receive mail addressed to them is seen even more plainly in the light of *Speiser v. Randall*, 357 U. S. 513, 521, where the Court stated:

[S]ince only considerations of the greatest urgency can justify restrictions on speech . . . the procedures by which the facts of the case are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford.

Under Section 4008, however, there are *no* safeguards afforded to those who are placed on the Postmaster General's list and there is *no* procedure by which the facts of the case—i.e., whether mail is in fact communist political propaganda—are adjudicated. In the absence of such procedures, the statute is plainly in violation of the due process clause of the Fifth Amendment.

The decision in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, should control the instant case. There the Attorney General, without notice or hearing, designated three organizations as Communist in a list used in connection with determinations of disloyalty of government employees and disseminated to all departments of the Government. A majority of the Court agreed that whatever the constitutional authority of the Attorney General to prepare lists of Communist organizations, he could not act without proper procedural safeguards. As stated in the concurring opinion of Mr. Justice Black (341 U. S. at 143), " * * * I agree with Mr. Justice Frankfurter that the Due Process Clause of the Fifth Amendment would bar such condemnation without notice and a fair hearing." See also 341 U. S. at 137-38 (opinion of Mr. Justice Burton); 341 U. S. at 178-81 (opinion of Mr. Justice Douglas).

The parallel to the *Joint Anti-Fascist* decision is clear. The lists maintained under Section 4008 are of individuals who "desire" to receive "communist political propaganda." As pointed out above, these lists have been circulated in the past among congressional committees and executive agencies with the power and often the intention to use the information in individual loyalty and security cases. Just as the Attorney General was held to lack power to compile such lists without proper procedural safeguards, so the Postmaster General is required under the Constitution to provide notice, hearing, and an appeal on the question whether the mail involved is in fact "communist political propaganda."

POINT IV

The classifications of those entitled to an exemption under Section 4008 are arbitrary and thereby deny appellant due process.

Bolling v. Sharpe, 347 U. S. 497, 499, recognized that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive" and ruled that under the Fifth Amendment "discrimination may be so unjustifiable as to be violative of due process." The classifications established by Section 4008, which determine the categories of readers who are exempt from the screening and listing provisions, are so arbitrary and unjustifiable that they deprive appellant and other members of the public of due process of law.

Section 4008 provides for unrestricted access to all literature from abroad for "any United States government agency, or any public library, or * * * any college, university, graduate school or scientific or professional institution for advanced studies, or any official thereof." On the other hand, all other persons, including publishers, writers, independent scholars, and just plain citizens with lively curiosity, are required to submit themselves to the statutory mechanism.

There is no possible justification for this discrimination. The citizen's right to be informed is as great and perhaps greater than that of impersonal institutions and libraries. This Court has recognized that the individual's "right to receive" literature is constitutionally protected, *Martin v. Struthers*, 319 U. S. 141, 143, and that rights safeguarded by the First Amendment are "at the foundation of a government based upon the consent of an informed citizenry." *Bates v. Little Rock*, 361 U. S. 516, 522-23. In short, the First Amendment is grounded, not upon the prerogative of a government agency to secure information or

the ability of a university to collect data, but upon the right of the individual citizen to have unrestricted access to information of every kind in order to exercise his public responsibilities.

Section 4008 flies in the face of this high constitutional policy. Not only does it interfere with the individual's legitimate quest for information, but it subordinates the citizen's right to receive literature as compared to governments, universities and other institutional recipients. The only possible reason for such a patent discrimination is that "communist political propaganda" is too hot for the average American to handle, and therefore should be kept out of his grasp as much as possible. But this is not a valid basis for discriminating either against the ordinary citizen or against writers, publishers, and editors, who all may have good reasons for reading material from all sources. The Constitution does not authorize the Government to protect the more timid or susceptible American citizens against material deemed harmful to them. Cf. *Butler v. Michigan*, 352 U. S. 380.

Just as the Court has determined that "all legal restrictions which curtail the civil rights of a racial group are immediately suspect," *Korematsu v. United States*, 323 U. S. 214, 216, so should be legal restrictions that directly impair freedoms guaranteed by the Bill of Rights. Under this test it is plain that Section 4008 arbitrarily discriminates against appellant and members of the public generally, and accordingly is in violation of the due process clause of the Fifth Amendment. Cf. *Skinner v. Oklahoma*, 316 U. S. 535; see generally Tussman and TenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341.

POINT V

The statute sanctions an unreasonable search and seizure prohibited by the Fourth Amendment and requires self-incrimination contrary to the Fifth Amendment.

Section 4008 is invalid under both the Fourth and Fifth Amendments to the Constitution. The leading case of *Boyd v. United States*, 116 U. S. 616, 633, noted "the intimate relation between the two amendments." It said:

They throw great light on each other. For the "unreasonable searches and seizures" condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the fifth amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the fourth amendment.

In the *Boyd* case the Court invalidated a judicial order entered pursuant to statute whereby Boyd was required to produce his private books and papers or else suffer the entry of judgment against him in an *in rem* action involving certain seized property. In other words, the Court refused to countenance under the Fourth and Fifth Amendments a procedure putting Boyd to a Hobson's choice in which he either had to disclose his private affairs or else lose the opportunity to establish a valid claim to property that was the subject of a pending action.

The present case presents a set of facts remarkably similar in pertinent respects to those in the *Boyd* case. Here too addressees of the proscribed mail are forced to the unpalatable choice between possible incrimination by disclosing a "desire" to receive "communist political

propaganda" or else losing forever the opportunity to receive mail which is addressed to them and rightfully theirs. In fact, the procedure established under Section 4008 is even harsher than in *Boyd* because here the Postmaster General need not await any decision by addressees before obtaining and inspecting the alleged "communist political propaganda;" the statute itself makes provision for such seizure irrespective of the wishes of addressees. And the incriminating quality of the disclosure is likewise clearer here than in *Boyd*. In that case it was uncertain whether the papers involved would in fact have been incriminatory, but we know from experience that the names listed pursuant to Section 4008 have been used to the injury of individuals before congressional committees and in other respects.

Although an early decision held that a search of other than first class mail without a warrant does not constitute an unreasonable search and seizure, *Ex parte Jackson*, 96 U. S. 727, that case has no application here. For the permissibility of a search under the Fourth Amendment is to be determined by its nature and its purpose. In the *Jackson* case, the search that was found to be reasonable was specifically limited to finding evidence of a particular crime. Here, on the other hand, there is no suggestion that the mail itself is criminal in character. Instead, the search is unlimited in scope and is directed at the political content of the mail. It is difficult to imagine a purpose more at odds with the policies underlying the Fourth Amendment, the essence of which is the protection of privacy. As stated by Mr. Justice Brandeis in his classic dissent in *Olmstead v. United States*, 277 U. S. 438, 478:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material

things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, *every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.* (Emphasis added.)

In the *Jackson* case itself, the Court anticipated improper inspections of other than first class mail, such as the one in the instant case, and decisively rejected the possibility of its being valid. The Court said, 96 U. S. 727, 733:

Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.

If the rights guaranteed by the Fourth Amendment "are to be regarded as of the very essence of constitutional liberty," *Gouled v. United States*, 255 U. S. 298, 304, the kind of officious inspection conducted at large pursuant to Section 4008 is plainly invalid.

POINT VI

The constitutional issues are appropriate for immediate adjudication in this action.

The court below never reached the merits of the present controversy. It dismissed the action on the ground that the issues were moot or lacked ripeness and that the appellant lacked standing to raise the constitutional questions on his own behalf or as representative of third parties. This ruling misconceived the nature of the limitations on

the exercise of jurisdiction by this Court. The *Heilberg* case, which explicitly disagreed with the court below, reflects a correct understanding of the doctrines of mootness, ripeness and standing.

A. Appellant's claim challenging the detention of mail by the Postmaster General is not moot.

The court below regarded that portion of appellant's claim which challenged the Postmaster General's power to detain "communist political propaganda" as moot because "defendant has ordered the unimpeded delivery of plaintiff's mail" (R. 21). But this conclusion is incorrect because appellant continues to suffer impairment of his rights under the First Amendment.

There is not now and there cannot ever be in the future an "unimpeded delivery" of appellant's mail. The statutory screening process necessarily delays delivery not only of mail found to contain "propaganda", but all other unsealed mail from abroad which must be screened.

Where foreign language publications are involved, the screening may take place at a center other than that where the mail is received. Each item found to contain "communist political propaganda" must be checked first to learn if it is addressed to an exempt addressee, then against the lists to determine if it is desired. And only after it is ascertained that instructions have been received from a particular addressee is delivery finally made.

Thus, even though appellant is now listed as entitled to receive literature addressed to him, his mail is subject to considerable delay. And because this detriment is continuing and is not capable of being cured under the procedures established by Section 4008, appellant's claim is not moot.

B. Appellant's claim challenging the listing procedure is not premature.

The court below ruled that the portion of appellant's claim which challenged the listing procedure established pursuant to Section 4008 was unripe for decision because, although appellant is concededly listed as a person "desiring" to receive "communist political propaganda," the "threat of future public distribution of the list is not sufficiently imminent * * * " (R. 24, 27).

The fallacy in the lower court's reasoning is its ready assumption that the lists would be kept out of the hands of officials or members of the public who might take action against or stigmatize appellant. As we have already observed (*supra*, pages 23-24), this conclusion is invalid because it is inconsistent with the past practice of those maintaining lists, it is inconsistent with a fair reading of the affidavit filed by the Postmaster General, and it is inconsistent with the political realities of the listing process. There is nothing hypothetical about the danger that the lists will be delivered to other government agencies, that congressional committees may subpoena listed persons, that government agencies may seek to impose sanctions because of the listings, and that there will be a public dissemination leading to community sanctions. As Judge Feinberg said, dissenting below, "there is a sufficient threat of injury to satisfy the requirement of 'ripeness' " because of "the irreparable nature of the threatened injury and the improbability of plaintiff having sufficient notice of public disclosure of the list to allow him to raise his constitutional objections before the injury is inflicted." (R. 32)

This case is thus wholly unlike *Poe v. Ullman*, 367 U. S. 497, which was held not justiciable because of the uncertainty over whether the Connecticut birth control statute would ever be applied to the plaintiffs seeking a declaration of invalidity. Appellant here is listed and subject to disabilities inevitably associated with enforcement of Sec-

tion 4008. For the same reason *Communist Party v. Subversive Activities Control Board*, 367 U. S. 1, is not an inconsistent authority. In that case the Court held that certain objections to registering under the Internal Security Act were premature because the Communist Party had not yet registered. Here the listing is of course conceded.

The ripeness doctrine, which is merely one aspect of the general requirement that the federal courts adjudicate only cases and controversies, is far less rigid than the court below indicated. Thus, in *Adler v. Board of Education*, 342 U. S. 485, the Court adjudicated, without even discussing "ripeness", the merits of the constitutionality of a New York statute making ineligible for employment in any public school any person who advocates overthrow of the government by force despite the absence of any allegation in the plaintiffs' complaint of any imminent danger that they would lose their jobs. See also Davis, *Ripeness of Governmental Action for Judicial Review*, 68 Harv. L. Rev. 1122, 1326.

The lower court's failure to recognize the lack of rigidity in the doctrine of justiciability is part of the reason it misapplied the "public interest" rule which permits adjudication in cases where the offending action has temporarily ceased. See, e.g., *United States v. W. T. Grant Co.*, 345 U. S. 629, 632-33; *Walling v. Helmerich & Payne, Inc.*, 323 U. S. 37, 43. The other reason for its error is that it considered this rule in connection with the detention of appellant's mail rather than in relation to the listing procedure.

There is no doubt that appellant is listed and the question is the degree to which he will be harmed through the circulation of his name. As to that question there is a substantial public interest in immediate adjudication. In the words of the Court in *Heilberg*, "[T]o render this case moot

under these circumstances is to approve a device which would enable defendants to prevent any potential recipient of mail originating abroad from ever testing the constitutionality of Section 4008." Certainly the "public interest" in the *Walling* and *Grant* cases, *supra*, was no greater than the interest in adjudicating the validity of a dual infringement of First Amendment rights where the Government has taken deliberate action to preclude this Court from ever ruling on the merits.

C. Appellant has standing to represent third parties in challenging both the detention of mail and the listing procedure.

Although the court below recognized that there have been "numerous exceptions" (R, 27) to the doctrine that a litigant may not assert the rights of third parties, it concluded, contrary to the *Heilberg* court and Judge Feinberg, that "The present case does not fit within any of the established exceptions" (R. 28).

This ruling is inconsistent with the leading cases in this Court establishing the right to litigate on behalf of third parties. In *Barrows v. Jackson*, 346 U. S. 249, 255-59, a white seller of property was allowed to raise an equal protection claim by potential Negro buyers who were not before the Court because the "respondent is the only effective adversary of the unworthy covenant." 346 U. S. at 259. And in *NAACP v. Alabama*, 357 U. S. 449, the National Association was considered "an appropriate representative" of a class of persons who were loath to assert their rights openly because of the harm that would follow loss of anonymity. See also *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 149-57 (Justice Frankfurter, concurring).

It would be difficult to imagine a case more in line with these principles than the present one. As in *NAACP v. Alabama*, *supra*, prospective litigants are deterred because

of the likelihood of harm that would follow loss of anonymity. And as in *Barrows v. Jackson*, *supra*, appellant is an "appropriate representative" of the class affected directly by Section 4008. Appellant is not merely a taxpayer, as in *Frothingham v. Mellon*, 262 U. S. 447, or a person with nothing more than the "general public's interest in the administration of the law." *Perkins v. Lukens Steel Co.*, 113, 125. His rights under the First Amendment are directly affected by the statute and, in addition, he represents the interests of those deterred from revealing themselves publicly as "desiring" to receive "communist political propaganda." As the *Heilberg* court said, "We do not think a person should be made to suffer social disapprobation in order to assert his constitutional rights." See also *Pierce v. Society of Sisters*, 268 U. S. 510, 534-36; Note, 77 Harv. L. Rev. 1165, 1170.

The Court has taken an appropriately realistic approach to the problem of standing even in cases not involving basic constitutional liberties. *Parmelee Transportation Co. v. Atchison, T. & S. F. Ry.*, 357 U. S. 77; *FCC v. Sanders Bros. Radio Station*, 309 U. S. 470; *Scripps-Howard Radio, Inc. v. FCC*, 316 U. S. 4. Furthermore, it has pointed out that the requirement of strict standing to sue on one's own behalf is "only a rule of practice," *Barrows v. Jackson*, 346 U. S. at 257, and that "justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification," *Poe v. Ullman*, 367 U. S. 497, at 508 and 524 (Justice Harlan, dissenting).

The instant case presents the strongest possible occasion for adjudication on the merits. Not only are fundamental constitutional liberties involved, but appellant has an interest as substantial and direct as those sustained by the Court in other cases. Moreover, to deny appellant standing here would be to permit the Government ingeniously and deliberately to immunize from judicial review a

statute that plainly has the effect of limiting free expression protected by the First Amendment. Such a result would be inconsistent with the basic tradition of judicial review and should not be tolerated by this Court. *Cf. Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362.

CONCLUSION

The judgment of the District Court should be reversed with instructions to enter judgment for the relief demanded in the complaint.

Respectfully submitted,

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February 5, 1965

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Office Supreme Court, U.S.
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MAR 3 1965

JOHN F. DAVIS, CLERK

Nos. 491 and 848

In the Supreme Court of the United States

OCTOBER TERM, 1964

**CORLISS LAMONT, DOING BUSINESS AS BASIC
PAMPHLETS, APPELLANT**

v.

THE POSTMASTER GENERAL OF THE UNITED STATES

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK**

JOHN E. FIXA ET AL., APPELLANTS

v.

LEIF HEILBERG

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

MEMORANDUM CONCERNING CHANGED CIRCUMSTANCES

ARCHIBALD COX,

*Solicitor General,
Department of Justice,
Washington, D.C., 20530.*

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MEMORANDUM CONCERNING CHANGED CIRCUMSTANCES

In these appeals, which involve the constitutionality of a statute providing for detention by the Post Office of "communist political propaganda" of foreign origin (39 U.S.C. 4008), the Court noted probable jurisdiction on December 7, 1964 (No. 491; 379 U.S.

926), and on February 1, 1965 (No. 848), and set the cases for argument together. *Lamont v. Postmaster General*, No. 491, is an appeal from a judgment of a three-judge district court in the Southern District of New York dismissing a complaint seeking declaratory and injunctive relief against further enforcement of the statute, on the ground that the case was rendered moot by an order of the Postmaster General directing that the plaintiff's mail not be detained in the future. *Fixa v. Heilberg*, No. 848, is an appeal from a judgment of a three-judge district court in the Northern District of California declaring the statute unconstitutional and enjoining its enforcement.

At the time when both these cases were decided in the district courts the Post Office Department's procedure for administering 39 U.S.C. 4008 was substantially as follows: Any mail of foreign origin which qualified as "communist political propaganda" was detained by the postal authorities, who then sent the addressee a notice identifying the detained matter and advising him that unless he requested delivery before a certain date by returning the notice and checking the appropriate box, the mail would be destroyed. The Post Office kept a file of the names and addresses of persons expressing a desire to receive such mail in order to enable it in the future to distribute this mail to willing addressees without the preliminary notice-and-return steps.

In both of these cases, the plaintiffs refused to return the notices and brought suit to enjoin the enforcement of the statute on the grounds of its unconstitutionality. In each instance, the Post Office

Department subsequently notified them that the institution of their suits constituted an expression of desire to receive "communist political propaganda" and that postal authorities had therefore been ordered to deliver such mail to them without preliminary detention. Asserting that this action by the Post Office Department rendered the suits moot since the plaintiffs could not thereafter be given any relief by a court order which they did not already enjoy, the government moved to dismiss each case as moot. The motion was sustained in the Southern District of New York (No. 491) but it was denied in the Northern District of California (No. 848). In moving for summary affirmance in No. 491, we contended that the district court's decision regarding mootness was correct, and in its order noting probable jurisdiction in that case, this Court directed the parties to discuss "the question of mootness as well as the merits of the case." 379 U.S. 926.

Reaching the merits of the constitutional issue in No. 848, the three-judge district court in that case held that the statute was unconstitutional largely on the premise that the administration of the statute required the Post Office Department to "maintain a list of persons indicating a desire to receive this type of mail," and that the availability of such a list to other government agencies would substantially deter addressees from exercising their constitutional rights to receive such mail. Jurisdictional Statement, No. 848, this Term, pp. 14-15.

Recently, after probable jurisdiction had been noted, the Postmaster General reviewed the procedure

for administering 39 U.S.C. 4008 and decided that, as a matter of internal administrative policy, it was desirable to abandon the practice of keeping card files of the names of persons who desired to receive "communist political propaganda." And while the government would not lightly alter the *status quo* in a matter pending before this Court, the considerations of policy were judged sufficiently urgent to require the immediate elimination of what might be regarded as a file of names of persons interested in "communist political propaganda" and were sufficiently persuasive to outweigh any embarrassment inherent in changing existing conditions. Accordingly, on March 1, 1965, the Postmaster General signed the Regional Letter which is reprinted at pages 7-9, *infra*, and which is to be distributed to Regional Directors and Postmasters within the Post Office Department. The letter alters the procedure followed in executing 39 U.S.C. 4008 in two respects which are material to these appeals: (1) Instead of treating the request by the recipient as a continuing request for the delivery of all such mail, the new procedure requires the Postal authorities to send a separate notification for each item as it is received, and the recipient to make a separate request for each item; (2) no list or file of persons requesting the delivery of such mail is retained by the Post Office Department. The effect of the former change is now to preclude any contention that these cases are moot, since it is clear that both plaintiffs will hereafter be required to return notices for each piece of "communist political propaganda" they wish to receive. On the other hand,

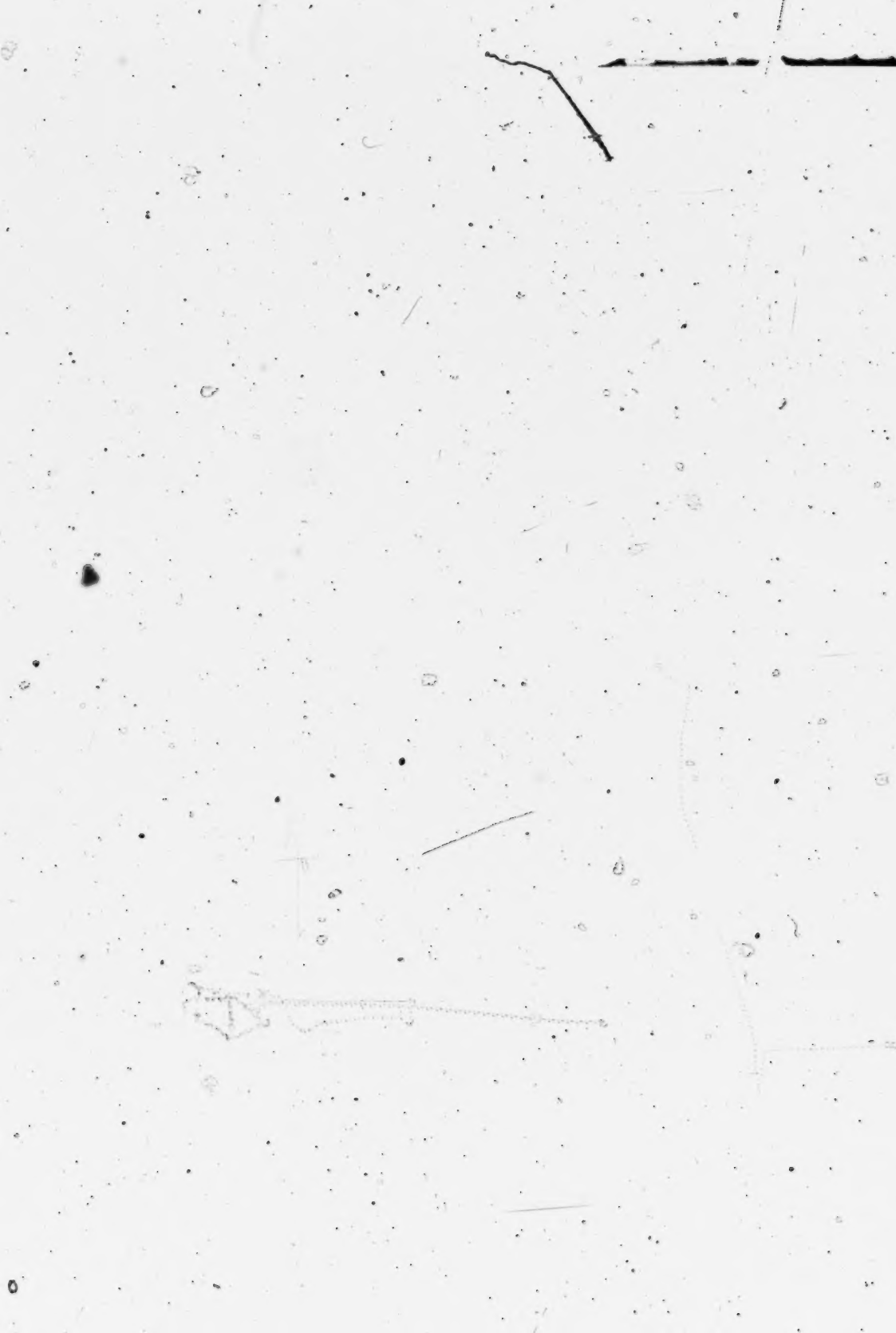
the abolition of any list or file of willing recipients makes the alleged inhibiting effect of the statute on First Amendment rights far less severe than it was under the former procedure.

Although the Post Office Department's change of procedure eliminates any ground for contending that the cases are moot and also alters the factual basis upon which the merits were presented to both district courts (and to this Court in the jurisdictional papers), the government is prepared to argue in this Court, without further delay, the merits of the constitutional issue as it is presented under the new procedures. If the Court should feel that it is more appropriate to remand the cases to the district courts—in No. 491 for consideration of the merits of the constitutional claim and in No. 848 for reconsideration of the constitutional challenge to the statute in the light of the new practice under which no record or list of persons requesting Communist political propaganda will be maintained (compare *Fortson v. Toombs*, No. 300, this Term, decided January 18, 1965; *Calhoun v. Latimer*, 377 U.S. 263)—we will take all necessary steps to expedite their disposition in the district courts and, if necessary, their representation to this Court upon the more complete record.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

MARCH 1965.



APPENDIX

POST OFFICE DEPARTMENT REGIONAL LETTER MARCH 1, 1965

Subject: Destruction of Records Relating to Delivery of Mail Containing Communist Political Propaganda.

I. *Purpose*

To provide for the immediate destruction of POD Forms 2153-X upon which addressees have indicated their desire to receive communist political propaganda.

II. *Action Offices*

Chief Postal Inspector.

Regional Directors at New York, New York; Atlanta, Georgia; Chicago, Illinois; Dallas, Texas; Seattle, Washington; San Francisco, California.

Postmasters at New York, New York; Miami, Florida; San Juan, Puerto Rico; Chicago, Illinois; New Orleans, Louisiana; Seattle, Washington; San Francisco, California; Los Angeles, California; Laredo, Texas; El Paso, Texas; Honolulu, Hawaii.

III. *Background.*

Since January 7, 1963, the postmasters at the eleven offices mentioned in paragraph II have been sending to addressees of mail matter considered by Bureau of Customs to be communist political propaganda, POD Form 2153-X. On this form addressees are requested to indicate whether they desire to receive the mail matter mentioned. Upon receipt of this card by the postmaster it is appropriately filed for future refer-

ence solely for the purpose of eliminating the necessity of making subsequent contacts with the same addressee as additional mail matter arrives. Many addressees have objected to the maintenance of any such record.

IV. Statement of Policy

It has been decided that the Forms 2153-X returned to the eleven postmasters mentioned above will not in the future be retained in the files of the Department, except in those cases where the addressee indicates on the form that he does not desire to receive the specific items of mail mentioned or any other similar communist political propaganda. The Department will not, in the future, maintain any record of the wishes of those addressees who desire to receive communist political propaganda. This will require the eleven above mentioned postmasters to send inquiry cards to all addressees each time mail matter is received unless Form 2153-X is on file showing the addressee does *not* desire the specific item. Upon the return of the cards indicating that the addressee does desire to receive the mail matter mentioned, the mail matter will be delivered and the card promptly destroyed without record being made of its receipt.

V. Implementation of New Policy

Under the direct supervision of the Chief Postal Inspector, or his designee, the eleven postmasters in the offices mentioned in paragraph II will destroy all POD Forms 2153-X now maintained in their files and upon which the addressees have indicated that they desire to receive specified items of communist political propaganda.

The Chief Postal Inspector, or his designee, will report to the Postmaster General that he personally witnessed the destruction of all such cards and the number thereof destroyed.

Destruction of POD Forms 2153-X pursuant to this instruction will be accomplished no later than March 15, 1965.

/s/ JOHN A. GRONOUSKI,
Postmaster General.

FILED

MAR 9 1965

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
October Term, 1964

No. 491

CORLISS LAMONT, doing business as
BASIC PAMPHLETS,

Appellant,

v.

THE POSTMASTER GENERAL OF THE
UNITED STATES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**APPELLANT'S MEMORANDUM CONCERNING
CHANGED CIRCUMSTANCES**

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No. 491

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**APPELLANT'S MEMORANDUM CONCERNING
CHANGED CIRCUMSTANCES**

The Solicitor General, in a Memorandum Concerning Changed Circumstances, has advised the Court that the Postmaster General has directed a change in the procedures for enforcement of the statute (39 U. S. C., § 4008) whose constitutionality is at issue in this case. Since the statute is attacked as unconstitutional both on its face and as applied (R. 3) and since the procedures which the Postmaster General had adopted to enforce the statute are, at most, a subsidiary issue in the case, the action by the Postmaster General does not significantly affect the issues before this Court. It does, however, as the Solicitor General concedes, deprive the appellee of its defense of mootness, i.e., it is conceded that under the new conditions there is a justiciable issue before this Court.

Nevertheless appellee suggests that this Court may remand this case (and the companion case of *Fixa v. Heil-*

berg, No. 848, this Term) to the District Court for further consideration in the light of the new procedures. In support of this suggestion appellee refers to *Fortson v. Toombs*, No. 300 this Term and *Calhoun v. Latimer*, 377 U. S. 263. But in both of those cases a remand was ordered because a change in circumstances may have rendered the cause moot. Here the contrary is true. The change in circumstances makes it clear that the cause is *not* moot.

A remand will mean further briefing in the District Court (although the case was adequately briefed the first time); further consideration by that court, a further appeal to this Court, whatever the result below, and further briefing in this Court. All of the energy and expense thus incurred must be multiplied by two since there are two separate cases involved in these appeals. We can see no result at all from such procedure except further delay, further expense and totally unnecessary work for the District Courts involved and for this Court, as well as for counsel.

The change in circumstances does not even require changes in appellant's brief to this Court. Only Point I B considers the constitutional aspects of the listing procedure which has now been abandoned. The rest of the brief (except Point VI which was devoted to mootness) is as applicable to the changed conditions as it was to the old. If any consideration of the changes in procedures is needed, it can be had through appellee's brief and a reply brief. The case is not set for argument until the week of April 26.

The statute which is here attacked as a serious interference with First Amendment rights, was passed in 1962. This action has been pending since August 13, 1963. It must be conceded that the question of constitutionality is a substantial one. See District Court opinion in *Heilberg v. Fica*, D. C. N. D. Cal. No. 41660, Nov. 16, 1964. We recognize that some delay in the determination of such issues is necessary because of the requirements of orderly

judicial process. Such delay, however, is undesirable and ought not to be permitted to continue any longer than is absolutely necessary.

A remand here can only result in the continued abuse of the rights of American citizens for another eight to twelve months. There is nothing in the situation before the Court requiring any postponement of presentation of this case to the Court.

Respectfully submitted,

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March 8, 1965.

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Office-Supreme Court, U.S.
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Nos. 491 and 848

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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964

CORLISS LAMONT, DOING BUSINESS AS BASIC
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THE POSTMASTER GENERAL OF THE UNITED STATES

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LEIF HEILBERG

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLEE IN NO. 491 AND APPELLANTS IN NO. 848

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In the Supreme Court of the United States

OCTOBER TERM, 1964

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NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLEE IN NO. 491 AND APPELLANTS IN NO. 848

OPINIONS BELOW

The opinions of the three-judge district court in No. 491 (L.R. 18-33) ¹ are reported at 229 F. Supp. 913.

¹ "L.R." refers to the record in No. 491. "F.R." refers to the record in No. 848.

The opinion of the three-judge district court in No. 848 (F.R. 215-223) is reported at 236 F. Supp. 405.

JURISDICTION

The judgment of the district court in No. 491 was entered on May 19, 1964 (L.R. 35-36), and a notice of appeal was filed on June 17, 1964 (L.R. 37-38). The judgment of the district court in No. 848 was entered on November 25, 1964 (F.R. 223-224), and a notice of appeal was filed on December 17, 1964 (F.R. 226-227). Probable jurisdiction in No. 491 was noted on December 7, 1964 (379 U.S. 926), and in No. 848 on February 1, 1965. The jurisdiction of this Court rests upon 28 U.S.C. 1253.

QUESTION PRESENTED

Whether 39 U.S.C. 4008, as presently administered by the Post Office Department and the Customs Bureau, violates the First, Fourth or Fifth Amendment of the Constitution of the United States.

STATUTES AND REGULATIONS INVOLVED

The statutes involved in this case are Section 305 of the Postal Service and Public Employees Salary Act of 1962, 76 Stat. 840, 39 U.S.C. 4008, and Section 1(j) of the Foreign Agents Registration Act of 1938, 52 Stat. 631, 22 U.S.C. 611(j). The regulations involved are Customs Regulation 9.13, 19 C.F.R. 237 (January 1, 1964), and Post Office Department Regional Letter, RL No. 65-38. The statutes and regulations are set out in the Appendix, pp. 33-41, *infra*.

STATEMENT

1. *The statute.*—Both these cases were instituted to test the constitutionality of a statute enacted in 1962 to establish certain postal procedures with regard to particular foreign mailings addressed to persons within the United States. The statute (pp. 33-34, *infra*), 39 U.S.C. 4008, requires the Postmaster General to detain and to deliver "only upon the addressee's request" any mail having all of five characteristics: (1) unsealed; (2) originated, printed or otherwise prepared in a foreign country; (3) determined by the Secretary of Treasury to be "communist political propaganda"; (4) not furnished pursuant to subscription; and (5) not otherwise known to be desired by the addressee. The statute defines "communist political propaganda" in subsection (b) as material issued by or on behalf of any country with respect to which tariff concessions have been suspended or withdrawn or from which foreign assistance is withheld and which meets the definition of "political propaganda" provided in Section 1(j) of the Foreign Agents Registration Act of 1938. Subsection (c) of the statute exempts from its provisions any mail addressed to agencies of the United States Government and educational institutions and mail sent pursuant to a reciprocal cultural international agreement under which the United States sends an equal amount of matter to the country on whose behalf the "communist political propaganda" is issued.

The statute is currently administered by the Post Office Department and the Customs Bureau of the

Treasury Department as follows: The Customs Bureau initially determines which foreign countries meet the conditions prescribed in subsection (b).² All unsealed mail from those countries is then routed by the Post Office Department through one of ten screening points established by the Customs Bureau.³ At the screening points, exempt mail is sorted out by postal personnel, and it is immediately dispatched. The remaining mail is examined by Customs authorities to determine whether it constitutes "communist political propaganda" within the meaning of 39 U.S.C. 4068. Whatever mail matter is held not to be such propaganda is then dispatched, and what remains is detained by the Post Office Department to abide instructions from the addressee.

The Post Office sends a notice to the addressee (Form 2153-X) advising him that he has received unsealed mail matter which has been determined to be

² The countries from which mail matter arriving in the United States is routinely screened are Albania, Bulgaria, Cuba, Czechoslovakia, Danzig, East Prussia, Estonia, Hungary, Indochina, Kurile Islands, Latvia, Lithuania, Outer Mongolia, Poland, Rumania, Southern Sakhalin, Tanna Tuva, Union of Soviet Socialist Republics, and Yugoslavia. Mail coming from parts of the following countries which are under Communist domination or control are also screened: Cambodia, China, Germany, Korea, Laos, and Vietnam. In addition, mail coming from Canada, Hong Kong, Japan and Mexico is made available to the Customs Bureau screening units. Hearings on *Exclusion of Communist Political Propaganda from the U.S. Mails* before the Subcommittee on Postal Operations of the House Committee on Post Office and Civil Service, 88th Cong., 1st Sess. (1963), p. 8.

³ The current screening points are: Chicago, El Paso, Honolulu, Los Angeles, Miami, New Orleans, New York City, San Francisco, San Juan, and Seattle.

communist political propaganda, and that it cannot be delivered unless the addressee wants it. The notice (L.R. 13; F.R. 10) identifies the mail matter received and requests the addressee to indicate, by checking an appropriate box, whether he wishes to have the mail delivered. The notice states that if no response is received within twenty days, it will be assumed by the Post Office Department that the addressee does not want the identified publication or any similar publication which may subsequently arrive.

Before March 1, 1965, it was the policy of the Post Office Department to provide a space on the card for an indication of the addressee's desire to have all similar publications delivered in the future. This required the Post Office to keep a current file of persons who had indicated a desire to receive such publications. In a Regional Letter dated March 1, 1965 (RL No. 65-38, pp. 39-41, *infra*), the Postmaster General terminated this practice effective no later than March 15, 1965. We have been advised by the Post Office Department that notices sent after March 15 offer an addressee the choice of having the particular item delivered or not, and permit him to leave standing instructions as to future similar publications only if his wish is not to have them delivered.* We have also been advised that the revised notices to be issued under this changed procedure will inform addressees (1) that the Post Office will keep no record other than a list or file of those who, by returning

*The Post Office Department intends to retain its assumption that those who do not return the card want neither the identified publication nor any similar one arriving subsequently.

the notice or by silence, leave standing instructions not to have such mail delivered and (2) that the returned notice itself will be destroyed.

2. *District court proceedings.*—(a) *No. 491*—In July 1963, Dr. Corliss Lamont, who does business under the name "Basic Pamphlets" in New York, was notified by the Post Office Department under 39 U.S.C. 4008 that a copy of *Peking Review* #12 was being detained in San Francisco pending his instructions (L.R. 2, 10, 13). Dr. Lamont did not respond to the notice, but instead brought suit in the Southern District of New York to enjoin the enforcement of the statute and have it declared unconstitutional on the ground that it violated rights under the First and Fifth Amendments (L.R. 3, 10).

The Post Office Department thereupon notified Dr. Lamont that the institution of the suit was understood by the Department as "an expression of desire by Basic Pamphlets and you as owner and manager to receive all of your mail whether or not the Customs Bureau of the Treasury Department considers it to be Communist political propaganda" (L.R. 5). Accordingly, the Post Office advised, all mail being detained would be delivered immediately and no future mail addressed to Basic Pamphlets or to Dr. Lamont personally would be detained (L.R. 5-6). On the basis of this action by the Post Office Department, the government suggested that the case was moot (L.R. 14).

Dr. Lamont thereupon filed an amended complaint wherein he also alleged that the Post Office Department was keeping a list of those who had expressed a

desire to receive "Communist political propaganda" and sought to have his name removed from this list (L.R. 3-4). On Dr. Lamont's motion a three-judge court was convened (L.R. 7, 17-18). Cross-motions for summary judgment and for dismissal of the complaint were filed (L.R. 6, 17).

A majority of the three-judge court dismissed the complaint as moot (L.R. 19-30). It reasoned that as a result of the Post Office Department's treatment of Dr. Lamont's institution of suit as an expression of desire to receive such mail and the Postmaster General's order that Dr. Lamont's mail not be detained, there was no present controversy between the parties to the suit (L.R. 21-23). With respect to the claim that the Post Office's retention of a list presented a live controversy, a majority of the court held that the asserted danger of public disclosure was "largely speculative" and was "only an abstract possibility, not an immediate threat" (L.R. 25, 26). Hence it dismissed this aspect of the complaint as not ripe for adjudication (L.R. 27). Judge Feinberg dissented on the grounds that there was a sufficient question of fact regarding the likelihood of disclosure of the list to require denial of the motion to dismiss and that, in any event, Dr. Lamont was entitled to assert the rights of parties who would be afraid to bring suit (L.R. 31-33).

(b) No. 848—In July 1963, Leif Heilberg received Post Office Department Form 2153-X, which advised him that the Post Office was detaining one copy of a publication entitled "A Proposal Concerning The General Line of the International Communist Movement"

(F.R. 2-3, 10, 147-149). He thereupon instituted this action for a judgment declaring 39 U.S.C. 4008 unconstitutional and for an order enjoining the Postmaster in San Francisco, the Postmaster General, the Collector of Customs, the Secretary of the Treasury and their agents from enforcing the statute on the ground that the placing of his name on a list of persons willing to receive "Communist political propaganda" would stigmatize him and abridge rights guaranteed by the First Amendment (F.R. 3-4). He also alleged that the statute violated the Fifth Amendment in that it arbitrarily distinguished between persons like himself and educational and governmental institutions and because its standards for determining "communist political propaganda" were vague and uncertain (F.R. 7).

On September 16, 1963, the general counsel of the Post Office Department advised Heilberg by letter that the institution of his suit was considered by the Department to be an expression of desire to receive "Communist political propaganda" and that in the future no such mail addressed to him would be detained (F.R. 28-29, 31, 32). The government then filed a motion to dismiss the action on the ground of mootness (F.R. 35).

A three-judge court was empaneled, and after hearing arguments and testimony, it denied the motion to dismiss (F.R. 49-152). After interrogatories were submitted and answered by both sides (F.R. 158-161, 163-177, 178-180), the court held further hearings (F.R. 181-215) and then determined that the statute was unconstitutional on its face (F.R. 223). Re-

serving the question whether the delay in receipt of an addressee's mail under this statute alone infringes upon constitutional liberties (F.R. 219), the court held that the disclosure of identity required as a condition for receiving the mail amounted, in light of the Post Office's practice of keeping a list of willing addressees, to "an infringement upon the dissemination of ideas, and, therefore, a clear and direct invasion of First Amendment territory" (F.R. 221). The court held that this "invasion" was not justified by any compelling governmental interest and that there were alternative means for achieving the same result (F.R. 221-222). Consequently, it declared 39 U.S.C. 4008 unconstitutional under the First Amendment and enjoined its enforcement (F.R. 223-224).

ARGUMENT

Introduction and Summary

The present case, stripped of clichés and with broad abstractions reduced to concrete actualities, involves a very narrow question. Congress enacted Section 305 in the awareness that Communist political propaganda mailed to addressees in the United States on behalf of foreign governments was often offensive to the recipients and constituted a subsidy to the very governments which bar the dissemination of publications from the United States. Section 305, reduced to its simplest terms, represents a Congressional decision that the United States should not thus subsidize the delivery of the political propaganda of a foreign power when there is no reason to suppose that the addressee desires to receive it,

but that such mail should be made available, even at public expense, to those addressees who desire it. Accordingly, the statute calls for delivery of such mail whenever the Postmaster General has reason to believe that delivery is desired and, in other cases, directs him to ascertain and carry out the addressee's wishes. There is no censorship. There are no consequences except that delivery is suspended for a day or two while the addressee is put to the trifling task of marking a card if he wishes delivery.

We claim no support for this statute in large public interests such as would be needed to justify a true restriction upon freedom of expression or inquiry. There is no such restriction. The attack upon the statute reduces to the assertion that the United States has a constitutional duty to subsidize the plaintiff's receipt of propaganda from foreign countries which refuse reciprocal dissemination even though the plaintiffs have too little interest in the propaganda to request its delivery, and delivery to them would require affronting the sensibilities of other addressees opposed to distribution. The First Amendment imposes no obligation upon the federal government to subsidize such indiscriminate delivery of the propaganda of foreign powers.

The statute does not violate the Fifth Amendment. The definition of "communist political propaganda" is an adequate guide for administrative action. This is not a criminal statute which requires anyone at peril of life, liberty or property to speculate about its meaning.

The suggestion that a hearing is required is frivolous. There is no way in which a hearing could be held without detaining the mail for a brief period. Under the statute the mail must be, and is delivered, to any addressee who so requests as promptly as he could be given notice of a hearing and long before a hearing could be completed. Nor is there anything arbitrary in allowing distribution to educational institutions, libraries, scientific organizations and their personnel. The very nature of their activities indicates that they probably do desire the material for their own use or that of the public.

There is no search or seizure in violation of the Fourth Amendment. The examination of this third class mail is no different from the inspection required to determine whether it qualifies for such carriage. Requiring an addressee to indicate his desire to receive the mail does not force him to incriminate himself because the expression of such a desire would have no probative value in any imaginable prosecution.

I.

THE STATUTE DOES NOT VIOLATE THE FIRST AMENDMENT

Although "grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever" (*Hannegan v. Esquire, Inc.*, 327 U.S. 146, 156), not every postal regulation can be automatically assimilated to a law abridging freedom of expression. For the relevant conditions and consequences of a postal regulation, as

well as its substance, may be quite unlike anything involved in the attempted regulation of speech or publication. The present case exemplifies important differences. When the clichés are stripped away and attention is focused upon the precise scope and consequences of Section 305, it becomes apparent that no large questions of freedom to speak or to hear, or of privacy or association, are presented.

One special circumstance involved in the carriage of the mails—often unimportant standing alone but sometimes material in conjunction with others—is the cost to the government. The taxpayers, through the government, are subsidizing the distribution of literature, propaganda and other writings whenever the Post Office carries mail at less than cost. That was one of the concerns of the sponsors of Section 305. *Postal Rate Revision of 1962*. Hearings before the Senate Committee on Post Office and Civil Service, 87th Cong., 2d Sess. (1962) (hereinafter *1962 Senate Hearings*), pp. 842-843, 918-919, 930.

Second, in this case the senders of the mail are not persons with rights under the First or Fifth Amendments. The mail comes from overseas. The senders are foreign governments or persons acting on their behalf. Section 305 applies only to matter prepared in a foreign country and "issued by or on behalf of" certain foreign powers. Thus, there is not likely to be any violation or abridgment of a constitutional right to speak. See *Johnson v. Eisentrager*, 339 U.S. 763; *Galvan v. Press*, 347 U.S. 522; Schwartz, *The Mail Must Not Go Through—Propaganda and Pornography*, 11 UCLA L. Rev. 805, 842, n. 161 (1964).

In addition, as we show below, even the foreign power is allowed to enjoy the benefits of the subsidy in addressing anyone who desires to receive its message.

Third, the freedom of expression guaranteed by the First Amendment undoubtedly includes opportunities to read and hear as well as to publish and speak,² but the relationship of addressee to the sender of mail is altogether different from that between the publisher or speaker and his audience. Everyman's scrap basket attests the fact that the addressee of mail, if the government makes delivery, receives items that he does not want. The intrusion may seem trivial to some and important to others; but there is an intrusion upon the householder's attention quite unlike the effect of speeches upon a voluntary audience. Congress was aware, when Section 305 was adopted, that many recipients of the Communist propaganda from foreign powers at public expense were not only unwilling addressees but were sufficiently offended to complain to their representatives. See pp. 16-17, *infra*.

The amendment is addressed to these peculiarities of foreign mail. It deals with them in a manner which has minimal consequences for freedom of communication. The Post Office continues to carry the propaganda regardless of its source or content. It continues to make automatic delivery to anyone who, it has reason to believe, wishes to receive the propaganda. That is the case with respect to matter addressed to any government agency or public library

² *Martin v. Struthers*, 319 U.S. 141, 143; cf. *Marsh v. Alabama*, 326 U.S. 501.

or "any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof" (Section 305(c)(1)). It is a fair inference, although not inescapable, that such institutions and individuals may be interested in gathering a wide variety of published matter for their own use or that of others interested in reading it. Similarly, although there have been some difficulties in administration, the statute specifically excepts "any matter which is furnished pursuant to subscription";* for in such cases also the Post Office may fairly infer that the addressee desires the publication. Section 305 also excepts any other matter "ascertained by the Postmaster General to be desired by the addressee."

The sole consequence, therefore, is to suspend delivery at public expense of Communist propaganda from foreign powers or their agents for so long as there is no reason to suppose that the addressee desires to receive it. In such cases the Post Office inquires whether the addressee wishes the mail; if he says that he does, it immediately makes delivery. The practice is to ask the addressee to indicate his wish upon a pre-addressed post card. At one time files

* In the case of newspapers and other well-known periodicals the Post Office may fairly infer that regular copies are sent pursuant to subscription. Moreover, so long as one request for delivery of the mail was treated as notice of a continuing desire to receive it, the subscriber obtained the Communist propaganda without further action. The abandonment of all lists and card files has posed a problem in determining what material is furnished pursuant to subscription where the publication is not readily identifiable. It is impossible to state at this time how the Post Office will hereafter handle this aspect of the administration of Section 305.

of post cards were maintained so that the Post Office might continue to deliver such mail without further indication of the addressee's wishes, but because of criticism that such "lists" could be used by government agencies to scrutinize individuals' interests or beliefs, the files were destroyed, and a new card must be marked in each instance, which is then destroyed after it has served its purpose. However, the statute seems to make it plain that any individual who wishes to have the propaganda delivered without further inquiry may put the Postmaster General upon notice simply by a continuing request in a letter.

The net effect is small indeed. No one who wishes to receive any material is denied it. Such persons are put to the trifling nuisance of marking a post card addressed to the Post Office. There is a short delay in delivery, but it seems inconsequential when one recalls that the matter involved is foreign mail that has already traveled great distances by the slower forms of transportation.

It is true that there are probably some persons who because of inertia or carelessness fail to mark the post card requesting delivery and thus do not see materials which they would receive and might read if all the propaganda were automatically delivered. But the only senders denied this opportunity to intrude themselves upon that group of addressees are foreign powers and those acting on their behalf, and they are denied only the opportunity to have the United States subsidize the intrusion.

The question presented in the present case, therefore, comes down to whether so trivial and temporary an interference with the opportunity of persons in the United States to read the unsolicited propaganda of foreign powers at public expense is unconstitutional even though enacted by Congress to accomplish two legitimate objectives.

One purpose was to protect the sensibilities of the addressees of Communist propaganda who were affronted and often harassed by such mail, especially United States citizens of recent foreign origin. An investigation of the distribution of Communist propaganda through the mails was conducted by the House Un-American Activities Committee in 1956 and 1957. The committee was told early in its investigation that sometime during 1955 those in charge of a screening program which survived from World War II had learned that much of the unsolicited Communist propaganda being sent into the United States through the mails was directed to American citizens whose origins were in Soviet bloc countries. *Investigation of Communist Propaganda in the United States*, Hearing before the House Committee on Un-American Activities, 84th Cong., 2d Sess. (1956) (hereinafter *1956 House Hearings*), p. 4695. This sort of propaganda took the form of an appeal to these addressees to return to their homeland. See exhibits at *1956 House Hearings* 4707-4714. The Deputy Collector of Customs in charge of the program advised the committee that he had received many complaints from persons to whom this material had been addressed (*1956 House Hearings* 4696; see also *id.* at 5427):

Many such complaints have been sent to Members of the House and Senate. The tenor of these complaints are that the recipients do not wish to have this material and in some cases the addressees are frankly scared since their whereabouts in this country have become known. These people unfortunately do not know that this is part of a general program and that thousands of similar letters have been sent, the names often obtained from telephone directories and fraternal organization listings.

An illustrative letter sent by a group of five or six recipients of such mail was read to the committee. *1956 House Hearings 4717.*

To prevent unwanted mail from being inflicted upon unwilling addressees is not to censor their reading but to protect their privacy. The sponsor of the amendment made it plain that he had no reluctance to allow the widest circulation of Communist propaganda (*1962 Senate Hearings 930*):

Certainly we have little or nothing to fear from their propaganda; Americans are accustomed to learning all sides of all issues through our free press. But there is no reason why the American taxpayer should pay for the free or subsidized delivery of Communist propaganda by the Post Office.

In *Breard v. City of Alexandria*, 341 U.S. 622, this Court sustained a local regulation which struck in favor of privacy the balance "between some householders' desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results" (341

U.S. at 644). Intrusion into a mailbox is effective entry into the home, and there can be hardly any doubt that there is a legitimate governmental interest in protecting persons against such unwanted invasions. Indeed, the district court in No. 848 recognized as much, although it mistakenly supposed that this interest could be satisfied by use of the postal regulation which entitles any person to authorize the postmaster to withhold delivery of particular classes of mail. 39 C.F.R. 44.1(a) (F.R. 222). In many cases the addressee will have no reason to suppose that such propaganda will be addressed to him. He is, of course, put on notice by the receipt of propaganda, but the burden of stopping further distribution is no less than the burden upon the willing addressee to arrange it.

In relying upon *Breard v. City of Alexandria* we do not forget that house-to-house canvassing is a familiar—perhaps indispensable—method of seeking converts to new causes. *Martin v. City of Struthers*, 319 U.S. 141. Whatever the extent of the right to knock on doors to summon householders and request their attention, it is irrelevant here for *Breard* and *Struthers* involve the right of the canvassers, whereas here the senders of the mail are foreign powers entitled to no such constitutional protection. The same circumstance, we submit, answers any suggestion that Section 305 discriminates against the dissemination of particular ideas and thus constitutes a form of censorship. Section 305 applies only to propaganda

¹ This is the short answer to the argument that the statute is broader than necessary. See Brief for Appellant in No. 491, pp. 27-29.

transmitted by or on behalf of certain foreign governments which are refusing to open their mails to the free dissemination of publications from the United States. Since they are all Communist governments, it is safe to assume that they are not engaged in distributing other forms of political propaganda.

The second objective of the sponsors of Section 305 was to deny foreign powers which refused a reciprocal exchange the benefit of having the United States subsidize the delivery of their propaganda to persons who either (a) did not want it or (b) did not subscribe and had too little interest to mark a postcard indicating their desire for delivery. Representative Cunningham, the sponsor of Section 305, testified at the Senate hearings that his amendment was based upon a desire to make Communist political propaganda "pay its own way." *1962 Senate Hearings* 914. This was justified, he said, because Communist countries did not reciprocally permit American publications free access to their citizens (*1962 Senate Hearings* 919):

* * * The point is that they do not deliver our printed matter so it is truly and accurately a free delivery of mail by our Post Office Department because there is no reciprocity by the Communists.

We are spending our money to deliver their printed matter, but they are not spending their money to deliver ours.

In answer to a question from a member of the committee, the Congressman explained that Communist propaganda might be considered as "pay[ing] its way" if unrestricted distribution of it in the United States

would result in similar distribution of this country's literature in Communist countries (1962 *Senate Hearings* 927-928):

* * * The only way it can pay its way is if we get the same reciprocity from the Communist bloc nation. We can afford to spend a little of our money delivering their stuff if they will deliver ours, but they are not delivering ours. Therefore, we are not getting any benefit from delivering this stuff free.

His prepared statement made this point even more explicitly (1962 *Senate Hearings* 930):

In simple language, what the House of Representatives has said to the Communist-bloc nations is this:

"We demand a free exchange of ideas and information between our countries. You are not allowing our ideas and information to be circulated among your people; you are therefore violating the reciprocal terms of the Universal Postal Union. As a result we take this action and will stick to it until you permit the free exchange of information between our countries, including the right of inspection to see that all parties are living up to the agreement."

The subsidy was not trifling. In 1960 the number of pieces of Communist printed matter turned over to the Customs Bureau by the Post Office, excluding first class mail, was 21 million, 607 thousand pieces.

It is argued that the failure to make delivery unless requested interferes with the free receipt of knowledge because the necessity of making a request opens the doors to identification, publicity and reprisals. The interest in anonymity asserted here is

very different from the rights of an association to refuse to disclose its membership list for fear of reprisal which was recognized in such cases as *NAACP v. Alabama*, 357 U.S. 449, and *Bates v. Little Rock*, 361 U.S. 516.* Even if the abstract principle be the same, it has no practical application to the present case. There is not the slightest reason to anticipate governmental reprisal. The present procedure is calculated to reduce, if not eliminate, even the hypothetical possibility that to request delivery of Communist propaganda may lead to investigation. Although a card file was formerly maintained, Post Office procedure has been changed so that no list or file is maintained by that Department (pp. 39-41, *infra*). The addressee is informed that his returned postcard will be destroyed, so that he is disclosing his wish to read Communist political propaganda only momentarily to the postal official who receives and processes the returned notice. What small danger there is that he will become known in the community as a reader of Communist propaganda would seem less significant than the similar risk that might be inflicted, in the absence of Section 305, upon addressees to whom delivery was made even though they were in fact unwilling. Snooping and overzealous neighbors who are concerned about such mail are not likely to inquire how or why the foreign propaganda came to be delivered. We think—and sincerely hope—that both dangers are chimerical. One can hardly be greater than the other, however, and, if a choice must

* See also *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539.

be made, surely the one to bear the risk is the willing, not the unwilling, recipient.

The claim that there is a constitutional right to receive all mail without delay deserves only brief mention. Whatever right exists to uninterrupted delivery of the mails is certainly subject to reasonable regulation by the Post Office. Certain classes of mail, for example, travel more slowly than others. Mail which cannot fit into a box or which is registered and for which a recipient must sign may not be delivered unless the addressee comes to the Post Office to call for it. The delay in delivery in each of these instances is justified by administrative necessity. In the present case, as well, if an inquiry is first to be made of an addressee to determine whether he comes within the class of those which the statute was intended to protect, there will necessarily be some delay in delivery.

There is no indication whatever in this record that the materials detained by the Post Office were of a kind as to which timely delivery is essential. They came from overseas by relatively slow methods of transportation. It is quite clear, moreover, that delay is not the gravamen of the plaintiffs' complaint. If, for example, the statute reversed the presumption and authorized the Post Office to send a notice informing an addressee that Communist political propaganda being detained at the Post Office would be delivered to him in five days unless he returned the card indicating that he did not want it, the delay would be the same.

There is not the faintest resemblance between Section 305 and the licensing laws invalidated in the cases cited by appellant in No. 491 (Brief, pp. 17-19). *E.g.*, *Lovell v. Griffin*, 303 U.S. 444; *Schneider v. State*, 308 U.S. 147; *Thomas v. Collins*, 323 U.S. 516; *Niemotko v. Maryland*, 340 U.S. 268. The present statute does not empower government agents to decide what forms of expression will reach the public. The purpose of the pre-delivery examination in this case is not to decide, as a licensor or censor, whether its contents are fit for distribution. The sole function is to ascertain whether the government is being asked to subsidize the propaganda of a foreign power and a kind of material which the addressee may well be reluctant to receive. If the addressee wishes, the government affords the subsidy and makes prompt delivery. His right to know is unimpaired.

We do not suggest that any such large and important public interests are involved as would support a true invasion of freedom to speak or publication, or of freedom to hear, read and learn. No such interests are implicated on either side. In the final analysis the attack upon Section 305 necessarily asserts that the government owes the plaintiffs a constitutional duty to subsidize the indiscriminate receipt of propaganda from foreign powers (which refuse to disseminate American publications), even though the plaintiffs have too little interest in the propaganda to request its delivery and even though delivery to them would require affronting the sensibilities of other addressees unwilling to receive such distribution. Whatever the wisdom of the legislation or its political symbolism—

and important as they may be in other forums—the mere statement of the legal proposition is enough to reveal that the federal government has no such constitutional duty to subsidize such indiscriminate delivery of the mailings of foreign powers.

II

THE STATUTE DOES NOT VIOLATE THE FIFTH AMENDMENT

A. ALLEGED VAGUENESS IN THE DEFINITION OF "COMMUNIST POLITICAL PROPAGANDA" DOES NOT INVALIDATE THE STATUTE

In defining "Communist political propaganda" the statute incorporates the definition given to the word "political propaganda" in Section 1(j) of the Foreign Agents Registration Act of 1938, 22 U.S.C. 611(j), and adds to it the requirement that such propaganda be "issued by or on behalf of" certain defined countries which are generally those in the Communist bloc. Relying on decisions of this Court which have invalidated criminal statutes whose provisions were vague⁹ or loyalty-oath requirements which were phrased in broad terms,¹⁰ appellant in No. 491 contends that this statute violates the Fifth Amendment because it is vaguely phrased. But unlike the criminal cases, this statute does not require a person "at peril of life, liberty or property to speculate" as to its meaning. *Lanzetta v. New Jersey*, 306 U.S. 451, 453. Nor, unlike the loyalty-oath cases, is any person required to perform any affirmative act (with possible

⁹ *Connally v. General Construction Co.*, 269 U.S. 385; *Lanzetta v. New Jersey*, 306 U.S. 451; *United States v. Cardiff*, 344 U.S. 174, 176.

¹⁰ *Cramp v. Board of Public Instruction*, 368 U.S. 278; *Baggett v. Bullitt*, 377 U.S. 360.

criminal perjury consequences) in reliance on his interpretation of the statute's meaning. Section 305 is merely a guide to Post Office officials in exercising the administrative judgment whether to deliver the mail directly or first ascertain whether delivery is desired. In *Lichter v. United States*, 334 U.S. 742, 786, this Court enumerated a whole series of general statutory phrases which it had sustained in earlier cases as permissible delegations of administrative authority:

"Just and reasonable" rates for sales of natural gas, *Federal Power Comm'n v. Hope Gas Co.*, 320 U.S. 591, 600-601; "public interest, convenience, or necessity" in establishing rules and regulations under the Federal Communications Act, *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-226; prices yielding a "fair return" or the "fair value" of property, *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 397-398; "unfair methods of competition" distinct from offenses defined under the common law, *Federal Trade Comm'n v. Keppel & Bro.*, 291 U.S. 304, 311-312, 314; "just and reasonable" rates for the services of commission men, *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 431; and "fair and reasonable" rent for premises, with final determination in the courts, *Levy Leasing Co. v. Siegel*, 258 U.S. 242, 243, 248-250.

Even under the standards of the cases on which appellant relies, the definition is not unconstitutionally vague. The Foreign Agents Registration Act's definition of "political propaganda" has stood for more than 25 years without challenge. While it may,

as appellant argues, apply by its terms to marginal cases which were not within the legislative intention, that is not the test by which its constitutionality should be measured. *United States v. National Dairy Corp.*, 372 U.S. 29, 32. The words "political propaganda" are themselves readily comprehensible to persons of ordinary intelligence, and the added requirement that it be issued by or on behalf of certain Communist countries prevents wholesale application of the statute to publications beyond its intended scope.

B. THE FAILURE TO AFFORD AN ADMINISTRATIVE HEARING DOES NOT INVALIDATE THE STATUTE

Another Fifth Amendment challenge is based on the fact that the government officials in charge of administering Section 305 do not provide a full hearing before determining whether any particular piece of mail is Communist political propaganda (Brief, No. 491, pp. 34-36). To the extent that this claim is based on the existence of a Post Office "list" of willing addressees of Communist propaganda and this Court's decision in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, it is enough to say that the practice of keeping lists has now been abolished by the Postmaster General (pp. 39-41, *infra*).

As for the mail matter itself, no suggestion is made by plaintiffs as to why a hearing should be required. This is not a case, as were *A Quantity of Books v. Kansas*, 378 U.S. 205, and *Marcus v. Search Warrant*, 367 U.S. 717, in which publications are seized or suppressed. The only determination made by the Customs Bureau agents is whether the material should

be delivered directly or be held for the request of the addressee. The addressee would seem to be the person entitled to notice of any hearing. Once he was given notice there would be nothing to hear; he may have the mail for the asking. The entire notion of an adversary hearing is meaningless in this context.

C. THE CLASS OF EXEMPT RECIPIENTS IS NOT ARBITRARILY SELECTED

The final Fifth Amendment challenge is that the exemptions provided in subsection (c)(1) are arbitrary and that the entire statute must, consequently, fall. The argument proceeds, however, on a basic misapprehension as to the purpose of the exemption. Appellant in No. 491 assumes that the exemption for government agencies, public libraries, or educational institutions is based on the premise that the material covered by the statute "is too hot for the average American to handle" (Br., p. 38).

In fact, however, as the plain meaning of the statute and its legislative history establish, it is intended to reach "Communist political propaganda" addressed to persons whose wishes regarding receipt of such material is unknown. The statute expressly provides for delivery of such mail to the addressee on his request or if his desire to receive it "is otherwise ascertained by the Postmaster General." In other words, Congress was as anxious to deliver such mail to those who wanted it as it was to spare those who did not.

During the hearings on the legislation, representatives of educational institutions, libraries, and scientific organizations testified in opposition to the Cun-

ningham amendment." Their position was based largely on their own need to obtain the sort of information which would be contained in the publications to which the statute would apply. After this testimony, Representative Cunningham agreed to add the following provision to his bill (1962 *Senate Hearings* 923):

Provided, however, that any mail matter addressed to any United States Government agency, any college or university, or any public library shall be excluded from the provisions of this section.

This was obviously a recognition of the fact that this group of recipients would overwhelmingly want to receive such mail, and it would be a needless administrative burden to require notices to be sent to them. Congressman Udall subsequently summarized this thinking as follows: "

* * * I would think it is a rational assumption to make that the material is wanted if it is addressed to Hubert Jones, professor of Russian

¹¹ 1962 *Senate Hearings* 858-859, Letter and resolution from the American Association of University Professors; *id.* at 863-867, Testimony, an official of the National Science Foundation; *id.* at 870-873, Testimony, L. Quincy Mumford, Librarian of Congress; *id.* at 875-880, Statement, the American Council on Education; *id.* at 887-889, Statement, American Association of University Women; *id.* at 895-897, Statement, Association of Research Libraries; *id.* at 897-899, Statement, American Library Association; *id.* at 906-911, Statements and letters from other educational institutions.

¹² *Exclusion of Communist Political Propaganda from the U.S. Mails*, Hearings before the Subcommittee on Postal Operations of the House Committee on Post Office and Civil Service, 88th Cong., 1st Sess. (1963), p. 64.

Studies, American University or to the Russian editor or the foreign editor of the New York Times.

III

THE STATUTE DOES NOT VIOLATE THE FOURTH AMENDMENT

A final challenge to 39 U.S.C. 4008 is based on the Fourth Amendment, presumably on the ground that the inspection of the mail matter received by any particular addressee constitutes an unreasonable search or seizure (Brief, No. 491, pp. 39-41). Plaintiffs do not explain, however, how the Post Office's examination of unsealed mail matter—which is expressly left unsealed for purposes of postal inspection (39 U.S.C. 251)—constitutes a search or seizure. Nothing at all is confiscated, and the only invasion of privacy is precisely that which the sender contemplated when he sent his mail unsealed rather than by first-class postage. See *Ex parte Jackson*, 96 U.S. 727.

Appellant in No. 491 agrees that third-class mail may be searched to find evidence, but apparently contends that it may not be read in order to determine its contents. But such mail must remain unsealed precisely for the purpose of permitting postal officials to inspect it and determine whether it qualifies as third-class mail. 39 U.S.C. 251, 235. The sort of examination involved in determining whether the mail is covered by 39 U.S.C. 4008 is no different from the inspection provided under 39 U.S.C. 251. In each instance the mail is not being read in order to decide whether it should be suppressed or in order to invade the addressee's privacy. The only purpose of both

inspections is to determine how the mail should be carried and delivered while in the custody of the Post Office.

The contention that an addressee is put to the choice of surrendering his mail or incriminating himself by coming forward to claim it (Brief, No. 491, pp. 40-41) is untenable. Evidence that an addressee of third-class mail expressed a desire to receive unsealed and unsolicited Communist political propaganda can, by no stretch of the imagination, be incriminatory because it has no conceivable probative value in a criminal prosecution. Even in a prosecution under the Smith Act such evidence would be inadmissible because the prejudice to defendant and deterrence to legitimate inquiries would outweigh any slight probative value it might have.

CONCLUSION

For the foregoing reasons, the judgment in No. 491 should be affirmed and the judgment in No. 848 should be reversed.

Respectfully submitted.

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MARCH 1965.

APPENDIX

Section 305 of the Postal Service and Public Employees Salary Act of 1962, Public Law 87-793, October 11, 1962, 76 Stat. 840, 39 U.S.C. Section 4008:

(a) Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be "communist political propaganda", shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

(b) For the purposes of this section, the term "communist political propaganda" means political propaganda, as defined in section 1(j) of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611(j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951

or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended.

(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material whether or not "communist political propaganda" addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government mails an equal amount of material for delivery in any country described in subsection (b).

Section 1(j) of the Foreign Agents Registration Act of 1938, 52 Stat. 631 (22 U.S.C. 611(j)), reads:

(j) The term "political propaganda" includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political sub-

division of any other American republic by any means involving the use of force or violence. As used in this subsection the term "disseminating" includes transmitting or causing to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce or offering or causing to be offered in the United States mails;

TREASURY DEPARTMENT,
BUREAU OF CUSTOMS,
Washington, January 4, 1963.

To: Collectors of customs, appraisers of merchandise (Mail Division).

Subject: Restrictions and prohibitions: Importation of political propaganda in the mails.

Reference: Section 9.13, Customs Regulations, as added by Treasury Decision 55797, approved December 27, 1962.

1. PURPOSE

This circular is to call attention to Treasury Decision 55797, copy attached, promulgating regulations under Section 305, title III of the Postal Service and Federal Employees Salary Act of 1962, Public Law 87-793, approved October 11, 1962 (39 U.S.C. 4008), relating to Communist political propaganda arriving in the mails from abroad.

2. ACTION

The special customs units which will administer the law and regulations in question have been established at the ports of Chicago, Ill., El Paso, Tex., Los Angeles, Calif., Miami, Fla., New Orleans, La., New York, N.Y., San Francisco, Calif., Seattle, Wash., and Honolulu, Hawaii. All mail subject to examina-

tion under this law will be submitted to the special customs units by the Post Office Department.

3. EFFECTIVE DATE

The above-mentioned law and regulations are effective on January 7, 1963.

4. SUPERSEDED MATERIAL

Circular RES-15-PEN, dated April 7, 1961, is hereby superseded.

File: PEN 633.3 K.

PHILIP NICHOLS, Jr.

Commissioner of Customs.

(T.D. 55797)

MAIL MATTER, COMMUNIST POLITICAL PROPAGANDA— CUSTOMS REGULATIONS AMENDED

Section 9.13, Customs Regulations, relating to mail matter determined to be Communist political propaganda, added

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C.

To Collectors of Customs and Others Concerned:

TITLE 19—CUSTOMS DUTIES

CHAPTER I—BUREAU OF CUSTOMS

PART 9—IMPORTATIONS BY MAIL

Section 305, title III of the "Postal Service and Federal Employees Salary Act of 1962," Public Law 87-793, approved October 11, 1962, added a new section 4008 to title 39 (The Postal Service), United States Code, entitled "Communist political propaganda." The section becomes effective on January 7, 1963.

Subsection (a) of section 4008 requires determinations to be made as to whether certain mail matter is "Communist political propaganda" in accordance with the definition prescribed by subsection (b) of section 4008.

Part 9 of the Customs Regulations is hereby amended, as set forth below, to add a new section 9.13 to place in collectors of customs the authority to make the foregoing determinations. The new section also provides, among other things, that such determinations shall be communicated forthwith to the appropriate postmaster.

New section 9.13 shall become effective on January 7, 1963, and reads as follows:

9.13 Communist political propaganda

(a) Collectors of customs shall make determinations required by subsection (a) of 39 U.S.C. 4008* as to whether mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country is "Communist political propaganda" within the meaning of subsection (b) of 39 U.S.C. 4008.* Such determinations shall be communicated forthwith to the appropriate postmaster.*

*(a) Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be "communist political propaganda", shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable

(b) A collector of customs is authorized to make the foregoing determinations with respect to all mail matter whether it arrives in the customs collection district under his jurisdiction or in a customs collection district under the jurisdiction of any other collector of customs.

(c) Subsection (c) of 39 U.S.C. 4008 provides for the delivery of certain mail matter to specified classes of addresses without reference to whether such mail matter is "Communist political propaganda." The Post Office Department will determine which mail is in these categories (sec. 305, 74 Stat. 654; 39 U.S.C. 4008).

Part 9 is amended to add a footnote designated "9" reading as follows:

time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

(b) For the purposes of this section, the term "communist political propaganda" means political propaganda, as defined in section 1(j) of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611(j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951 or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended.

(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material, whether or not "communist political propaganda" addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government mails an equal amount of material for delivery in any country described in subsection (b) (39 U.S.C. 4008).

(R.S. 161, as amended, sec. 624, 46 Stat. 759; 5 U.S.C. 22, 19 U.S.C. 1624.)

PHILIP NICHOLS, Jr.,
Commissioner of Customs.

Approved: December 27, 1962.

JAMES P. HENDRICK,

Acting Assistant Secretary of the Treasury.

Mr. DULSKI. The committee will stand adjourned until tomorrow at 10 o'clock.

(Whereupon, at 11:53 a.m., the subcommittee adjourned, to reconvene at 10 a.m., Thursday, June 20, 1963.)

RL No. 65-38

POST OFFICE DEPARTMENT

DEPUTY POSTMASTER GENERAL

[Regional Letter]

Date: 3/1/65

Subject: Destruction of Records Relating to Delivery of Mail Containing Communist Political Propaganda.

I. PURPOSE

To provide for the immediate destruction of POD Forms 2153-X upon which addressees have indicated their desire to receive communist political propaganda.

II. ACTION OFFICES

Chief Postal Inspector.

Regional Directors at New York, New York; Atlanta, Georgia; Chicago, Illinois; Dallas, Texas; Seattle, Washington; San Francisco, California.

Postmasters at New York, New York; Miami, Florida; San Juan, Puerto Rico; Chicago, Illinois; New Orleans, Louisiana; Seattle, Washington; San

Francisco, California; Los Angeles, California; Laredo, Texas; El Paso, Texas; Honolulu, Hawaii.

III. BACKGROUND

Since January 7, 1963, the postmasters at the eleven offices mentioned in paragraph II have been sending to addressees of mail matter considered by Bureau of Customs to be communist political propaganda, POD Form 2153-X. On this form addressees are requested to indicate whether they desire to receive the mail matter mentioned. Upon receipt of this card by the postmaster it is appropriately filed for future reference solely for the purpose of eliminating the necessity of making subsequent contacts with the same addressee as additional mail matter arrives. Many addressees have objected to the maintenance of any such record.

IV. STATEMENT OF POLICY

It has been decided that the Forms 2153-X returned to the eleven postmasters mentioned above will not in the future be retained in the files of the Department, except in those cases where the addressee indicates on the form that he does not desire to receive the specific items of mail mentioned or any other similar communist political propaganda. The Department will not, in the future, maintain any record of the wishes of those addressees who desire to receive communist political propaganda. This will require the eleven above mentioned postmasters to send inquiry cards to all addressees each time mail matter is received unless Form 2153-X is on file showing the addressee does *not* desire the specific item. Upon the return of the cards indicating that the addressee does desire to receive the mail matter mentioned, the mail matter will be delivered and the card promptly destroyed without record being made of its receipt.

V. IMPLEMENTATION OF NEW POLICY

Under the direct supervision of the Chief Postal Inspector, or his designee, the eleven postmasters in the offices mentioned in paragraph II will destroy all POD Forms 2153-X now maintained in their files and upon which the addressees have indicated that they desire to receive specified items of communist political propaganda.

The Chief Postal Inspector, or his designee, will report to the Postmaster General that he personally witnessed the destruction of all such cards and the number thereof destroyed.

Destruction of POD Forms 2153-X pursuant to this instruction will be accomplished no later than March 15, 1965.

JOHN A. GRONOUSKI,
Postmaster General.

FILE COPY

Office-Supreme Court, U.S.
FILED

APR 9 1965

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1964
No. 491

CORLISS LAMONT, DOING BUSINESS AS BASIC PAMPHLETS,

Appellant,

—v.—

THE POSTMASTER GENERAL OF THE UNITED STATES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE**

NANETTE DEMBITZ

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156 Fifth Avenue

New York 10, N. Y.

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**BRIEF FOR AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE**

Interest of Amicus

The American Civil Liberties Union is appearing as *amicus*, with consent of the parties, not only because of its general concern with the free communication of ideas. It has an additional and particular interest in the cases at bar because the undersigned counsel represent, on behalf of the Union, the plaintiffs in an action in which the complaint was dismissed largely on the basis of the three-judge court's decision in *Lamont*. (*McReynolds and Pappenheim v. Christenberry et al.*, S. D. N. Y., No. 63, Civ. 3648, appeal pending; pet. for cert. before judg. den. by this Court, Jan. 18, 1965.)

ARGUMENT

1. Statutory Provision Applied in *McReynolds*

The *McReynolds* complaint highlights an important aspect of the statute regulating "communist political propaganda" in the mails [39 U. S. C. §4008], besides those apparent in the cases at bar.

Plaintiff Pappenheim, a sociologist, had purchased a number of books and pamphlets at a New York bookstore in December 1963. They were mailed by the bookstore to his residence in Cambridge, Massachusetts, the return address on the package being that of the bookstore. The Post Office detained the package, and sent him the "communist political propaganda" notification. After two letters from Dr. Pappenheim to the Post Office, he received in Cambridge on March 6th the package of books purchased and mailed from New York in December.¹

Thus, Dr. Pappenheim's complaint arose solely under the statutory provision for detention of "mail . . . which originates . . . in a foreign country . . . upon its subsequent deposit in the United States domestic mail." While the course of the litigation averted a determination of the extent of detention and political labeling of domestic mail, Dr. Pappenheim's complaint illustrates the potential of the Post Office's statutory authority. Contrary to the Government's suggestion in the cases at bar (Govt. Br., p. 12), the statute covers not only foreign senders but also senders of mail who are undoubtedly entitled to the protections of the First and Fifth Amendments.

¹ As in the cases at bar, the Government moved to dismiss Dr. Pappenheim's complaint on grounds of mootness, on the basis of the delivery of the mail and a letter from the Post Office promising him future deliveries.

2. Forms of Interference With First Amendment Rights

Basically and ineradicably, regardless of varying administrative methods, the statute requires Government determination of whether printed matter is "Communist political propaganda"; interruption and delay in its transmission; and some type of written affirmation by an addressee of his desire to receive the material thus categorized by the Government. This Court has repeatedly recognized coercion of a constitutional dimension in government exposure of an individual in a light the community regards as opprobrious (e.g., *Louisiana v. NAACP*, 366 U. S. 293, 295-6; *Watkins v. United States*, 354 U. S. 178, 197-8). Here the Government itself affixes an opprobrious stamp—"communist political propaganda". The Government thus interferes with the First Amendment right to read, for individuals will tend to fear acknowledging to the disapproving Government their interest in the disparaged reading matter, and will tend to avoid contact with ideas so insidious that they require Government labeling.

Government interference with the reception of reading matter of course also curtails the rights of expression and dissemination of publishers and senders. Indeed, there is some deterrence to those wishing to disseminate ideas in print—and the cost of doing so by means other than unsealed mail may be prohibitive—in the mere knowledge of the Government's concern with the transmission of "communist political propaganda." Further, the Government labeling interferes with the free play of reason of those addressees who eventually receive the "communist political propaganda." This Government grading of political content will tend to guide the individual's thinking, contrary to the precept that "It is not the function of our Government to keep the citizen from falling into error." (*Ameri-*

can Communications Ass'n v. Douds, 339 U. S. 382, 442 (Jackson, J. concurring in part).)

Administrative Methods

We have described the minimum interferences required by the statute. The methods of administering it are at this writing uncertain. Until a month ago, the Post Office kept a record of addressees requesting delivery of "communist political propaganda." Apparently to modify the constitutional problem posed by the statute, the Post Office now destroys such records (Govt. Br., pp. 37-39).

This Court can hardly judge the statute's impact on First Amendment rights on the basis of the past month's declared practice. Compare *Walling v. Helmerich & Payne*, 323 U. S. 37, 43; *United States v. Oregon Medical Society*, 343 U. S. 326, 333. The present policy, announced only in the form of a Post Office Department Regional Letter, has none of the hallmarks of permanence and stability. Practice under the previous purported policy was wavering and inconsistent (see Appendix, *infra*, p. 9); and the current announcement leaves many problems unsettled.

Apparently if an addressee once notifies the Post Office not to deliver mail or once fails to return a card, he will no longer receive any "communist political propaganda" or notification about it (Govt. Br., p. 5, n. 4)—this regardless of whether his silence is inadvertent due to the time of the card's receipt or even its miscarriage in the mail. Thus, some members of the American Association for the Advancement of Slavic Studies² complained about the short

² As a result of the filing of suit for Dr. Pappenheim, undersigned counsel received a letter from the President of the American Association for the Advancement of Slavic Studies, Professor Joseph S. Berliner of Brandeis University, stating that the "Asso-

deadline for the return of notices, especially during vacations. In any event, individuals will be cut off from a wide variety of reading-matter (see Section 3 below), without any awareness of the scope of their deprivation or the nature of particular items. Further, despite the statutory exception for subscriptions, members of the American Association found that subscription copies were detained (*infra*, p. 13). It is unclear whether the Post Office maintains lists of those subscribers it considers bona fide, thus continuing the evils of Government listing of people interested in "communist political propaganda."

3. What Is "Communist Political Propaganda"— the Post Office's Area of Discretion

How wide an area of expression is affected by the expansible interference with First Amendment rights permitted under the statute? The phrase "political propaganda" perhaps has, as the Government states, a readily understood meaning (Govt. Br., p. 26)—it probably connotes in popular usage an exaggerated or biased presentation for the sake of advocacy. The statute at bar, however, incorporates the definition of "political propaganda" provided in the Foreign Agents Registration Act (22 U. S. C. 611(j)), which is much broader than the popular meaning. Under that Act the term includes even a factual, objective, and unbiased statement about a foreign country or foreign political party or the foreign policies of the United States.

The Government's brief (p. 24) stresses that propaganda is subject to the statute only if it is issued "by or on be-

ciation has long been interested in the legislation dealing with the confiscation of 'subversive' literature, much of which constitutes the stock in trade of our scholarly research efforts." Professor Berliner enclosed a memorandum summarizing an Association survey of its membership as to the effect of the statute, which appears in the Appendix, *infra*, p. 11.

half" of the 29-odd countries to which the statute is being applied. However, the mail detained in *McReynolds and Pappenheim v. Christenberry*, and also apparently in the cases at bar, was not ostensibly issued by or on behalf of a foreign country. The Post Office and the Customs Bureau assume authority to determine when mail originating in an included country, should be deemed issued on its behalf, without any proof or evidence to this effect. Thus, employees of these Departments have arbitrary discretion in a broad area of expression to interfere when they wish. Such capricious control in the area of expression offends the First and Fifth Amendments, even though, as the Government argues (Br., pp. 24-25), no penal sanction is imposed. See *Burstyn v. Wilson*, 343 U. S. 495, 504-506.

4. Lack of Justification for Statute

First Amendment freedoms are highly vulnerable and fragile (see *Speiser v. Randall*, 357 U. S. 513, 525), and any impediment to communication on political subjects interferes with the Amendment's primary purpose (*Roth v. United States*, 354 U. S. 476, 484). The fear of ideas implicit in and instilled by official concern with receipt of "communist political propaganda," is antithetical to the free debate of ideas. The Government's interest in protecting some individuals from the annoyance of receiving unwanted mail from abroad (Govt. Br., pp. 16-17), is insufficient to warrant its interference with free expression.* Furthermore, this protection could be accomplished without labeling the items which might be unwanted as "communist

* The fact that unsealed printed matter is carried at less than cost (Govt. Br., p. 19) does not of course justify its treatment in a manner interfering with First Amendment rights (see *Manual Enterprises v. Day*, 370 U. S. 478).

political propaganda"; the alleged objective could be accomplished without as great an interference with First Amendment rights.

CONCLUSION

It is respectfully submitted that the judgment in No. 491 should be reversed and in No. 848 affirmed.

Respectfully submitted,

NANETTE DEMBITZ

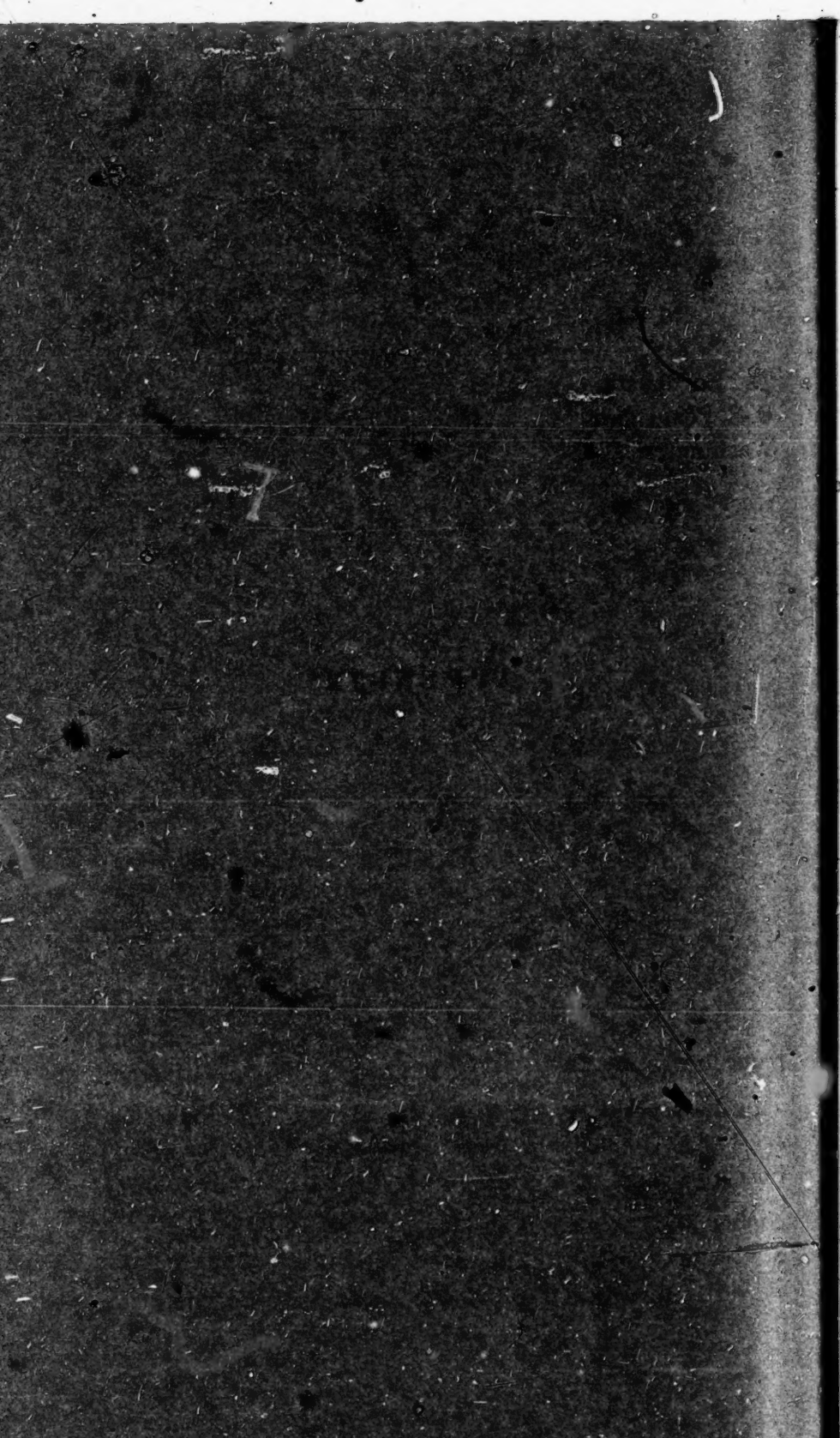
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156 Fifth Avenue

New York 10, N. Y.

Attorneys for Amicus Curiae

April, 1965



APPENDIX

.168-14 127th Avenue
Jamaica, New York 11434
March 8, 1965

The Postmaster General
U. S. Post Office
Washington, D. C.

Dear Sir:

Re: Public Law 87-793

I am a professional anthropologist (Ph.D., Columbia University) and, as my dossier will indicate, I subscribe to various literary, scientific, and political journals which are published in Communist countries.

Several years ago I wrote a letter of protest about the Public Law noted above to the then Postmaster General, Mr. Day. I wished not only to let Mr. Day know my opinion of this Law, but also to request that the Postmasters of the several ports of entry for foreign mail be advised that I wish to receive *all* mail, solicited or not, which is addressed to me.

After an exchange of letters on this subject between myself and Tyler Abell, Esq.; of your Department, my request was granted.

In the several years which have elapsed, I have received more than a few of the . . . post cards from the POD's Foreign Propaganda Units in various parts of the country.

On several occasions, unfortunately, my reply card either went astray or is pending action in some lost file; and I did not receive the books and periodicals in question. . . .

Letter Dated March 8, 1965

I have this date received another such note from the Postmaster in San Francisco, Foreign Propaganda Unit, 395 Beale Street, Room 271. I am advised that a magazine published in Hong Kong, EASTERN HORIZON, issue no. 2, 1965 . . . will be destroyed if I do not reply by March 26th. I replied at once, indicating that I wish to receive this magazine (and similar publications).

. . . I should respectfully appreciate your advising the people in San Francisco of my wishes—namely, to receive my mail promptly and without loss. . . They were so advised by Mr. Abell some years ago but seem to have forgotten.

Respectfully yours,

S. H. POSINSKY

AMERICAN ASSOCIATION FOR THE
ADVANCEMENT OF SLAVIC STUDIES*

112 Davenport House University of Illinois
Champaign, Illinois

December 31, 1963

Memo to: Officers and other Members of the Board

From: Ralph Fisher

Subject: Responses to questionnaire about delivery of
"Communist propaganda."

Early in December, as you will recall; the regular members of the Association were sent the following inquiry:

Dear Member:

At its recent meeting in New York, the Board of the Triple A Double S took note of a New York Times story of October 24 which reported in part as follows:

* Board of Directors—1964.

Elected at large: John A. Armstrong, Joseph S. Berliner, Alexander Dallin, Victor Erlich, Franklyn D. Holzman, Gleb Struve.

Representing organizations: Robert C. Tucker (Political Science), Donald W. Treadgold (JCSS), Edward J. Brown (Language and Literature), Holland Hunter (Economics), George Kish (Geography), Robert F. Byrnes (History).

Officers—1964.

President: Joseph S. Berliner, Department of Economics, Brandeis University, Waltham 54, Mass.; Vice President: John A. Armstrong, Department of Political Science, University of Wisconsin, Madison 6, Wisconsin; Secretary: Ralph T. Fisher, Jr., 112 Davenport House, University of Illinois, Champaign, Ill.; Treasurer: John N. Hazard, 431 West 117th St., Columbia University, New York 27, N. Y.; Managing Editor of the Slavic Review: Donald W. Treadgold, 508 Thomson Hall, University of Washington, Seattle 5, Wash.

Letter Dated December 31, 1963

'Under a law passed by Congress last January, the Post Office has been delaying the delivery of what it judges to be Communist propaganda mailed from foreign countries. In many cases this mail is unsolicited.

'Addressees are notified that the material is being held. They may have it delivered by filling out a form.'

Members of the Board wondered to what extent specialists in the field have in fact been experiencing any obstacles to the normal delivery of materials from Soviet-bloc sources. The Board decided to send out this informal inquiry in the next general mailing. Your reply will aid the Board in deciding whether any action is desirable on its part. Please mail the lower portion of this sheet back with your proxy.

The lower part of the sheet provided space for checking either "I have experienced no obstacles to delivery of materials from Soviet-bloc sources," or "I have experienced obstacles." If he checked the latter, the respondent was asked to "explain what the difficulties were, what action you took, and what was the result."

A total of some 291 replies was received. Of these, 212 simply indicated that they had experienced no obstacles, and let it go at that.

Of the remaining 79, about half had also experienced no obstacles, but wished to make some comment anyway. Several people observed (as many of the above 212 probably could have) that the reason they experienced no difficulties was that they did not receive materials from the Soviet bloc anyway. Six persons indicated that they knew of

Letter Dated December 31, 1963

others whose mail was held up. Two of these remarked that they knew of people who had been afraid to send in the form saying that they wanted the material in question, and had thus foregone receiving it.

About forty of our members reported having had their mail held up. Thirty-three of these said that after they notified the postal authorities that they wanted to receive all such material, they had had no further trouble. Three, however, said they had had repeated clashes with the postal authorities, even after making their positions clear.

Although our questionnaire did not ask specifically about the use of home as opposed to university or institutional addresses, four persons volunteered the information that the materials held up were addressed to their homes. Some suggested that the use of an institutional address would eliminate interference by the postal authorities, but at least one person had also had mail held up which was addressed to his office.

Four persons complained that they had found the post office's deadline for replies was set too early to allow time for the forwarding of the notice, especially during vacations. This meant that by the time the addressee returned the form saying he wanted the publication, it had already been destroyed.

One justification for the law has been the alleged need of protecting the unwary American citizen from a barrage of unsolicited propaganda from abroad. But the way the law is being administered casts doubt upon this explanation, for twenty-two of our members reported that the materials that were held up were *subscription* copies. This seems deserving of special note.

Letter Dated December 31, 1963

A sentiment made explicit by fourteen persons and implicit in the remarks of many others was that the Association should do something about repealing the law.

• • • • •

Sincerely,

/s/ RALPH

Ralph T. Fisher, Jr.

Secretary



FILE COPY

Office-Supreme Court, U.S.

FILED

APR 23 1965

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

October Term, 1964

No. 491

CORLISS LAMONT, doing business as
BASIC PAMPHLETS,

Appellant,

v.

THE POSTMASTER GENERAL OF THE
UNITED STATES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

POINT I

The statute violates the First Amendment.

A. Contrary to the Government's assertion, 39 U. S. C., 4008 "purports to deal directly with speech and the expression of political ideas", *Speiser v. Randall*, 357 U. S. 513, 527. Cf. *American Communications Associations v. Douds*, 339 U. S. 382. Its purpose is to discourage reading matter, the content or sources of which are disapproved by the Government. This is established by a review of the screening program beginning with its administration in 1940, Schwartz and Paul, *Foreign Political Propaganda in the Mails*, 107 U. of Pa. L. Rev. 621, 633-636, and by the statements of the proponents of the legislation, excerpts from which are set forth in Appendix A to this brief.

The statute discourages the reading of such material because of the fear of adverse consequences. Nearly two decades of the loyalty-security programs belie the Government's statement that "[t]here is not the slightest reason to anticipate government reprisal" (Br. p. 21).¹ In Appendix B to this brief, we set forth a sampling of the considerable evidence available that the reading habits of American citizens have long been the subject of governmental inquiry. In fact, the deterrent effect was admitted by Assistant Postmaster General Tyler Abell when he said:

"First, I would like to correct one minor thing. We don't send postcards. We considered it, but we felt it might be embarrassing to some people to have a notice going through the open mail saying, 'You have been getting Communist propaganda addressed to you, do you want it?' And people would object that their postman and their neighbors might possibly see it, so that we do put that in an envelope." Hearings, Subcommittee of the [House] Committee on Appropriations, *Treasury-Post Office Departments and Executive Office Appropriations for 1965: Post Office Department*, 88th Cong. 2d Sess., p. 63.

But, citation on the point is surely unnecessary since this Court will not blind itself to "what all other persons can see and understand", *Child Labor Tax Case*, 259 U. S. 20, 37; *United States v. Rumely*, 345 U. S. 41, 44.

Even if the Government were correct in its claim that a request for foreign mail does not "open the doors to identification, publicity or reprisals" (Br., p. 20), the statute would remain a substantial deterrent, for the average American citizen may—not unreasonably—have a sense of danger.² The Government's suggestion that the addressee

¹ "Br." refers to the Government's brief.

² Cf. "Through the harassment of hearings, investigations, reports, and subpoenas the Government will hold a club over speech and over the press." *United States v. Rumely*, 345 U. S. 41, 58, concurring opinion of Mr. Justice Douglas.

has "disclosed his wish to read Communist political propaganda *only momentarily* to the postal official" [italics added] (Br., p. 21) is small comfort, where the so-called momentary disclosure is cumulative.³

B. In view of the statute's direct impact upon First Amendment rights, the Government has the burden of showing that the statute has the different purpose and effect claimed for it, i.e., to save money for the Government or to spare the sensibilities of the unwilling addressee. The Government has failed to sustain this burden.

The testimony of Mr. Louis J. Doyle, General Counsel of the Post Office Department, explicitly rejected the claim that the mail was carried "free of charge", *Hearings Before the Committee on Post Office and Civil Service*, U. S. Senate, 87th Cong. 2d Sess. on H. R. 7927, p. 842. International mail is governed by the Convention of the Universal Postal Union which provides that mail, with proper postage paid in the country where mailed, is to be delivered to the addressee by the country of destination. "We obtain in exchange the delivery of our letters and printed matter mail, destined for foreign countries, without paying the foreign postal systems any part of the postage we collect." *Ibid.*

Since the mail from this country is considerably in excess of the mail from the Soviet bloc, "the United States Post Office actually gains under this mutual arrangement, and there is no proper basis for statements that delivery of foreign mail adds to the deficit of the Post Office and increases the need for postal rate increases", *id.* at 850-851.

³ The assurances of the Post Office Department that there will be no disclosure of the postcard notices must also be qualified in the light of recent admission that even first class mail has been routinely turned over to another government agency, the Internal Revenue Service. *New York Times*, April 14, 1965, p. 43, col. 8.

In any event, the Post Office has power by statute and regulations to make the adjustments in rates by international agreement or unilaterally so that the financial problem is illusory. See *e.g.* 39 U. S. C. 505.

C. There is no substantial evidence that the sensibilities of unwilling addressees will be affected and that it was the actual reason for the statute. The argument did not move the House Committee on Un-American Activities, to which some such statements were made, and that was not the purpose of the original Cunningham bill which would have proscribed delivery of such propaganda even to willing addressees.

This is a far different case from that of *Breard v. City of Alexandria*, 341 U. S. 622, where the Court upheld a city ordinance prohibiting door-to-door commercial⁴ solicitation. The Government cannot assimilate the facts of this case to the trespass and violation of privacy found in *Breard* by characterizing the mere delivery of mail an "[i]ntrusion into a mailbox" (Br., p. 18).

D. In any event, the statute must fall because a legitimate governmental purpose "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms", *Aptheker v. Secretary of State*, 378 U. S. 500, 508, quoting from *NAACP v. Alabama*, 377 U. S. 288, 307. This rule was applied in *Aptheker* despite the claim of a far more substantial governmental interest than is claimed here. *A fortiori*, it applies to the present case, where the Government admits that there is no compelling state interest for the impairment of First Amendment rights (Br., p. 10). As the Court said in *Speiser v. Randall*, 357 U. S. 513:

"The State clearly has no such compelling interest at stake as to justify a short-cut procedure which

⁴ But see the dissenting opinion of Mr. Justice Black, joined in by Mr. Justice Douglas, 341 U. S. 622, 645.

must inevitably result in suppressing protected speech." 357 U. S. at 529.

We have already indicated (Appellant's Br., pp. 27-29) two available alternatives less drastic than the instant statute. To this we add the example of Public Law 87-793, Section 307, of October 11, 1962, 76 Stat. 841, relating to obscene matter which was the basis for Congressman Walter's proposal with respect to Communist political propaganda (Appellant's Br., p. 28); the statute is set forth in Appendix C.

In response to our suggestion that existing regulations would permit a single notice by the unwilling addressee which would stop all such mail, 39 CFR 44.1(a) (Appellant's Br., p. 29), the Government states that this would place a burden upon the unwilling addressee. It requires no argument to show that such a burden is negligible in comparison to that imposed upon the willing addressee by the statute and by the new procedure of the Postmaster General.

POINT II

The statute violates the Fifth Amendment.

A. The term "communist political propaganda" is unconstitutionally vague.

The Government is in error in arguing that the constitutional objection of vagueness is limited to criminal or quasi-criminal suits (Br., pp. 24-25). In *Louisiana v. United States*, October Term, 1964, No. 67, 85 S. Ct. 817, this Court applied the principle to a civil suit to protect the right to vote. The First Amendment rights here involved are of equal stature.

The argument that the definition of political propaganda in the Foreign Agents Registration Act "has stood for more than 25 years without challenge" (Br., p. 25) does not establish its adequacy. It is much easier to comply

with than to challenge governmental regulatory statutes. The term "political propaganda" is no more comprehensible than the term "communist conspiracy" which has been held to be unduly vague, *O'Connor v. United States*, 99 App. D. C. 373, 242 F. 2d 404 (C. A. D. C. 1956). See also *United States v. Lattimore*, 94 App. D. C. 268, 215 F. 2d 847 (C. A. D. C. 1954), aff'g in part 112 F. Supp. 507 (D. C. 1953). The statutory definition creates boundaries so far-reaching and confusing as to defy reasonable comprehension.⁵

Statutes may have been upheld despite the possibility of "marginal cases which were not within the legislative intention" (Br., p. 26). But what may be true in an anti-trust case, *United States v. National Dairy Corp.*, 372 U. S. 29, is not equally true in the First Amendment area. As the Court pointed out in *Speiser, supra*, the effect of so broad a statute is to preclude the exercise of constitutionally protected rights.

B. The classification of exempt recipients is arbitrary and denies appellant due process.

The Government's brief completely fails to meet the argument that the statutory classifications are arbitrary and unjustifiable (Appellant's Br., pp. 37-38). There is no indication that the general public does not desire the material as much as the exempted group. The average citizen's right is at least equal to, if not greater than, that of governmental agencies, public libraries or graduate schools to receive this material without delay and discouragement and destruction.

The statutory exemption was not based upon a determination that the exempted group had a special right; it was a belated response to a powerful and respectable lobby. The public should not suffer discrimination because it lacks the protection of a people's lobby.⁶

⁵ Our principal brief gave several examples (Appellant's Br., p. 34). It is enough to add the ban upon the *London Economist*.

⁶ See Mason, *Brandeis, A Free Man's Life*, 125. *Time Magazine*, Aug. 15, 1955, p. 33.

The Post Office Department appears to have compounded the discrimination by delivering detainable materials to such large-scale commercial enterprises as radio and television stations, newspapers and magazines while requiring ordinary citizens to follow the statutory procedure. (See brief for appellee in No. 848, pp. 5-6.)

POINT III

The statute violates the Fourth and Fifth Amendments.

The Government's claim that unsealed mail may be examined to determine its political content (Br., p. 29) is exactly the view adopted by the District Court in *Esquire v. Walker*, 55 F. Supp. 1015, 1018 (D. C. 1944) which upheld the Postmaster General's right to censor second class mail. That decision, however, was reversed, 151 F. 2d 49, *aff'd sub nom. Hannegan v. Esquire*, 327 U. S. 146.

The sender of unsealed mail assumes that it will be examined to determine whether it falls within the proper postal category and, therefore, is entitled to the lower rate. See 39 U. S. C. 251 (now 4058). Neither he nor the addressee contemplates that it will be read for content for the purpose of discouraging its delivery.

The Government's suggestion that the addressee's expression of desire to receive communist propaganda "has no conceivable probative value in a criminal prosecution" does not meet the self-incrimination problem. The proper test is whether such evidence might possibly have a tendency to incriminate or might supply a lead to more incriminating evidence. See *Hoffman v. United States*, 341 U. S. 479, 488. We have already shown that such reading matter has been used in security hearings and in enforcement of statutes having criminal penalties. See Appendix B.

The Government has failed to respond to appellant's argument based upon the discussion in *Boyd v. United States*, 116 U. S. 616, 633 on the interaction between the Fourth and Fifth Amendments, in *Olmstead v. United States*, 277 U. S. 438, 478 (dissenting opinion) on the right of privacy, and to the Court's anticipation in *Ex parte Jackson*, 96 U. S. 727, 733 of improper inspection of unsealed mail (Appellant's Br., p. 41).

CONCLUSION

The judgment of the District Court should be reversed with instructions to enter judgment for the relief demanded in the complaint.

Respectfully submitted,

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April 22, 1965.

APPENDIX A

Legislative Purpose

In addition to the statements quoted at pages 26 and 27 of appellant's principal brief, the congressional debate contains numerous other frank statements of the purpose of the statute. In the House (on consideration of the original Cunningham amendment) the following statement was made:

Rep. Murray: "This section * * * has the effect of preventing the receipt, handling, transportation or delivery by the United States postal service of any mail determined by the Attorney General to be Communist political propaganda." 108 Cong. Rec. 740.

Rep. Harsha: "I earnestly urge your full support of this effort to stop the delivery of Communist propaganda." 108 Cong. Rec. 746.

Rep. Pelly: "At the outset, let me say that H.R. 7927 as reported by the committee last year contains the so-called Cunningham amendment, which would reinstate the ban against distribution of Communist propaganda from abroad." 108 Cong. Rec. 750.

Rep. Rousselot: "Mr. Chairman, I am especially pleased to see that we have maintained what has become known as the Cunningham anti-Communist literature section of the bill. * * * This anti-Communist mail provision will go a long way in allowing the Post Office Department and the Attorney General to prevent the continued influx of large amounts of Communist literature into this country which in many cases is directed to our youth, various church groups and other fine American segments of our society which do not realize that it is, in effect, poisonous Communist literature." 108 Cong. Rec. 750.

Rep. Derwinski: "However, another aspect of this bill before us deserves as much if not more attention, and that is the Cunningham amendment to prevent the flow of Com-

Appendix A—Legislative Purpose

munist propaganda into the country through the U. S. mails. * * * There is no reason whatsoever why the U. S. mail should be the vehicle for delivery of this Communist propaganda." 108 Cong. Rec. 751.

Rep. Rogers: (after discussing the quantity of printed matter mailed from Communist bloc nations) "I find it comforting, as I am sure the American people are comforted, to see that the committee has exercised its wisdom and made provisions in this bill to control the flow of communistic propaganda." 108 Cong. Rec. 779.

Similar views were expressed in the Senate in connection with the bill as it was finally enacted. Sen. Bush stated, " * * * it is not unreasonable to restrict propaganda of a Communist nature, to the extent, at least, that the people of this country want it restricted." 108 Cong. Rec. 20982.

Rep. Dulsky, a member of the House Post Office Committee which had reported out the original version of the Postal Rate Revision bill, later described §305 as "a monument of progress in combatting Communist political propaganda." Hearings, House Committee on Post Office and Civil Service, *Exclusion of Communist Political Propaganda from the U. S. Mails*, 88th Cong. 1st Sess., June 19 and 20, 1963, page 1.

APPENDIX B

Governmental Interest in the Citizen's Reading Matter

Statistics compiled from *Case Studies in Personnel Security* (Fund for the Republic) are set forth in Brown, *Loyalty and Security*, 489-497. They show that in 13 per cent of cases studied employees were asked about their reading, collection or subscription to literature (*id.*, Table 9, page 492). Eighty-seven out of 377 allegations in 227 security cases were based on reading, subscribing to, or collecting literature (*id.*, Table 21, page 495). The process extended to allegations regarding reading habits even of associates of the suspected employee in 32 of 198 allegations relating to 134 associates (*id.*, Table 27, page 497). An earlier study noted that "Charges of reading Communist literature were issued by eight different departments and occurred in ten out of seventy-five cases." Bontecou, *The Loyalty-Security Program*, 109-110. In one of the few fully-reported cases appears the finding, "The evidence established that Mr. Chasanow did subscribe to a publication known as 'In Fact' some twelve (12) years ago * * *." *In re Abraham Chasanow* (Dept. of the Navy, 1953) B.N.A. Gov't Security & Loyalty 19:527, 528. The finding was part of a report by the Security Hearing Board which found the continued employment of Mr. Chasanow consistent with national security, but which was reversed by the Navy Department Security Appeal Board, *id.*, 19:531.

A further example appears in an Air Force Court Martial trial of an officer accused of various charges including espionage. The accused was required to testify, over his objection, about the presence of Communist literature or books in his brother's library. ACM 18074—Kauffman, 33 C.M.R. 748, reversed in part, without consideration of this question, *United States v. Kauffman*, 14 USCMA 283, 34 C.M.R. 63.

*Appendix B—Governmental Interest in the Citizen's
Reading Matter*

The Air Force Board of Review stated, 33 C.M.R. at 796:

"This evidence of accused's prior exposure to communistic literature and his association with an individual who possessed such literature would go directly to one of the issues in the case and was admissible."

One of the charges in a Coast Guard clearance proceeding was: "During the period of your affiliation with the Communist party you * * * read Communist Party literature and maintained that literature in your possession." *Re: Graham, Z-390309, Hearing, #2-60, United States Coast Guard, New York, May 17, 1960, Transcript page 4.*

The inhibiting effect of these inquiries and charges is obvious, though not susceptible of quantitative analysis. Professor Brown, op. cit. 192, notes that social scientists who have studied the problem "say that federal employees whom they have encountered tend to censor their reading and conversations, and to adopt what they take to be officially prescribed attitudes."

The role of Communist literature is stressed throughout the proceedings in Subversive Activities Control Board proceedings. See Recommended Decision by Kathryn McHale, Board Member, May 18, 1955, in *Brownell v. Veterans of the Abraham Lincoln Brigade* (part of the record in *Veterans of the Abraham Lincoln Brigade v. Subversive Activities Control Board*, now pending before the Court, No. 65, Oct. Term 1964) at 11-15. See also Gellhorn, *Security, Loyalty and Science*, 146-147, 215. The interest of one state investigatory committee in reading matter is documented in Countryman, *Un-American Activities in the State of Washington*, 56, 63, 132, 172(9), 180(5).

APPENDIX C**The Obscenity Statute**

Public Law 87-793, § 307, October 11, 1962, 76 Stat. 841, reads as follows:

In order to alert the recipients of mail and the general public to the fact that large quantities of obscene, lewd, lascivious, and indecent matter are being introduced into this country from abroad and disseminated in the United States by means of the United States mails, the Postmaster General shall publicize such fact (1) by appropriate notices posted in post offices, and (2) by notifying recipients of mail, whenever he deems it appropriate in order to carry out the purposes of this section, that the United States mails may contain such obscene, lewd, lascivious, or indecent matter. Any person may file a written request with his local post office to detain obscene, lewd, lascivious, or indecent matter addressed to him, and the Postmaster General shall detain and dispose of such matter for such period as the request is in effect. The Postmaster General shall permit the return of mail containing obscene, lewd, lascivious, or indecent matter, to local post offices, without cost to the recipient thereof. Nothing in this section shall be deemed to authorize the Postmaster General to open, inspect, or censor any mail except on specific request by the addressee thereof. The Postmaster General is authorized to prescribe such regulations as he may deem appropriate to carry out the purposes of this section.

SUPREME COURT OF THE UNITED STATES

Nos. 491 AND 848.—OCTOBER TERM, 1964.

Corliss Lamont, dba Basic
Pamphlets, Appellant,
491 v.
Postmaster General of the
United States.

On Appeal From the United
States District Court for
the Southern District of
New York.

John F. Fixa, Individually
and as Postmaster, San
Francisco, California, et
al., Appellants,
848 v.
Leif Heilberg.

On Appeal From the United
States District Court for
the Northern District of
California, Southern Di-
vision.

[May 24, 1965.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These appeals present the same question: is § 305 (a) of the Postal Service and Federal Employees Salary Act of 1962, 76 Stat. 840, constitutional as construed and applied? The statute provides in part:

"Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be 'communist political propaganda,' shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in

the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee." 39 U. S. C. 4008 (a).

The statute defines "communist political propaganda" as political propaganda (as that term is defined in § 1 (j) of the Foreign Agents Registration Act of 1938)¹ which is issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions or from which foreign assistance is withheld pursuant to certain specified statutes. 39 U. S. C. § 4008 (b). The statute contains an exemption from its provisions for mail addressed to government agencies and educational institutions, or officials thereof, and for mail sent pursuant to a reciprocal cultural international agreement. 39 U. S. C. § 4008 (c).

To implement the statute the Post Office maintains 10 or 11 screening points through which is routed all unsealed mail from the designated foreign countries. At these points the nonexempt mail is examined by Customs

¹ "The term 'political propaganda' includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence." 22 U. S. C. § 611 (j).

authorities. When it is determined that a piece of mail is "communist political propaganda," the addressee is mailed a notice identifying the mail being detained and advising that it will be destroyed unless the addressee requests delivery by returning an attached reply card within 20 days.

Prior to March 1, 1965, the reply card contained a space in which the addressee could request delivery of any "similar publication" in the future. A list of the persons thus manifesting a desire to receive "communist political propaganda" was maintained by the Post Office. The Government in its brief informs us that the keeping of this list was terminated, effective March 15, 1965. Thus, under the new practice, a notice is sent and must be returned for each individual piece of mail desired. The only standing instruction which it is now possible to leave with the Post Office is *not* to deliver any "communist political propaganda."² And the Solicitor General advises us that the Post Office Department "intends to retain its assumption that those who do not return the card want neither the identified publication nor any similar one arriving subsequently."

No. 491 arose out of the Post Office's detention in 1963 of a copy of the *Peking Review* #12 addressed to appellant, Dr. Corliss Lamont, who is engaged in the publishing and distributing of pamphlets. Lamont did not respond to the notice of detention which was sent to him but instead instituted this suit to enjoin enforcement of the statute, alleging that it infringed his rights under the First

² A Post Office regulation permits a patron to refuse delivery of any piece of mail (39 C. F. R. § 44.1 (a)) or to request in writing a withholding from delivery for a period not to exceed two years of specifically described items of certain mail, including "foreign printed matter." *Ibid.* And see Schwartz, *The Mail Must Not Go Through*, 11 U. C. L. A. L. Rev. 805, 847.

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and Fifth Amendments. The Post Office thereupon notified Lamont that it considered his institution of the suit to be an expression of his desire to receive "communist political propaganda" and therefore none of his mail would be detained. Lamont amended his complaint to challenge on constitutional grounds the placement of his name on the list of those desiring to receive "communist political propaganda." The majority of the three-judge District Court nonetheless dismissed the complaint as moot, 229 F. Supp. 913, because Lamont would now receive his mail unimpeded. Insofar as the list was concerned, the majority thought that any legally significant harm to Lamont as a result of being listed was merely a speculative possibility, and so on this score the controversy was not yet ripe for adjudication. Lamont appealed from the dismissal, and we noted probable jurisdiction. 379 U. S. 926.

Like Lamont, appellee Heilberg in No. 848, when his mail was detained, refused to return the reply card and instead filed a complaint in the District Court for an injunction against enforcement of the statute. The Post Office reacted to this complaint in the same manner as it had to Lamont's complaint, but the District Court declined to hold that Heilberg's action was thereby mooted. Instead the District Court reached the merits and unanimously held that the statute was unconstitutional under the First Amendment. 236 F. Supp. 405. The Government appealed and we noted probable jurisdiction. 379 U. S. 997.

There is no longer even a colorable question of mootness in these cases, for the new procedure, as described above, requires the postal authorities to send a separate notice for each item as it is received and the addressee to make a separate request for each item. Under the new system, we are told, there can be no list of persons who have manifested a desire to receive "communist political

propaganda" and whose mail will therefore go through relatively unimpeded. The Government concedes that the changed procedure entirely precludes any claim of mootness and leaves for our consideration the sole question of the constitutionality of the statute.

We conclude that the Act as construed and applied is unconstitutional because it requires an official act (*viz.* returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights. As stated by Mr. Justice Holmes in *Milwaukee Pub. Co. v. Burleson*, 255 U. S. 407, 437 (dissenting): "The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues" ³

We struck down in *Murdock v. Pennsylvania*, 319 U. S. 105, a flat license tax on the exercise of First Amendment rights. A registration requirement imposed on a labor union organizer before making a speech met the same fate in *Thomas v. Collins*, 323 U. S. 516. A municipal licensing system for those distributing literature was held invalid in *Lovell v. Griffin*, 303 U. S. 444. We recently reviewed in *Harman v. Forssenius*, 380 U. S. —, an attempt by a State to impose a burden on the exercise of a right under the Twenty-fourth Amendment. There, a registration was required by all federal electors who did not pay the state poll tax. We stated:

"For federal elections, the poll tax is abolished absolutely as a prerequisite to voting, and no equiva-

³ "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare." *Pike v. Walker*, 121 F. 2d 37, 39. And see Gellhorn, *Individual Freedom and Governmental Restraints* (1956), p. 88 *et seq.*

lent or milder substitute may be imposed. Any material requirement imposed upon the federal voter solely because of his refusal to waive the constitutional immunity subverts the effectiveness of the Twenty-fourth Amendment and must fall under its ban." *Id.*, p. —.

Here the Congress—expressly restrained by the First Amendment from "abridging" freedom of speech and of press—is the actor. The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. Just as the licensing or taxing authorities in the *Lovell*, *Thomas*, and *Murdock* cases sought to control the flow of ideas to the public so here federal agencies regulate the flow of mail. We do not have here, any more than we had in *Hannegan v. Esquire, Inc.*, 327 U. S. 146, any question concerning the extent to which Congress may classify the mail and fix the charges for its carriage. Nor do we reach the question whether the standard here applied could pass constitutional muster. Nor do we deal with the right of customs to inspect material from abroad for contraband. We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in

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sending for literature which federal officials have condemned as "communist political propaganda." The regime of this Act is at war with the "uninhibited, robust, and wide-open" debate and discussion that are contemplated by the First Amendment. *New York Times Co. v. Sullivan*, 376 U. S. 254, 270.

We reverse the judgment in No. 491 and affirm that in No. 848.

It is so ordered.

MR. JUSTICE WHITE took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 491 AND 848.—OCTOBER TERM, 1964.

Corliss Lamont, dba Basic
Pamphlets, Appellant,
491 v.
Postmaster General of the
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On Appeal From the United
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John F. Fixa, Individually
and as Postmaster, San
Francisco, California, et
al., Appellants,
848 v.
Leif Heilberg.

On Appeal From the United
States District Court for
the Northern District of
California, Southern Di-
vision.

[May 24, 1965.]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE GOLD-
BERG joins, concurring.

These might be troublesome cases if the addressees predicated their claim for relief upon the First Amendment rights of the senders. To succeed, the addressees would then have to establish their standing to vindicate the senders' constitutional rights, cf. *Dombrowski v. Pfister*, 380 U. S. 479, 486, as well as First Amendment protection for political propaganda prepared and printed abroad by or on behalf of foreign government, cf. *Johnson v. Eisentrager*, 339 U. S. 763, 781-785. However, those questions are not before us, since the addressees assert First Amendment claims in their own right: they contend that the Government is powerless to interfere with the delivery of the material because the First Amendment "necessarily protects the right to receive it." *Martin v. City of Struthers*, 319 U. S. 141, 143. Since the decisions today uphold this contention, I join the Court's opinion.

2 LAMONT v. POSTMASTER GENERAL.

It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. See, *e. g.*, *Bolling v. Sharpe*, 347 U. S. 497; *NAACP v. Alabama*, 357 U. S. 449; *Kent v. Dulles*, 357 U. S. 116; *Aptheker v. Secretary of State*, 378 U. S. 500. I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

Even if we were to accept the characterization of this statute as a regulation not intended to control the content of speech, but only incidentally limiting its unfettered exercise, see *Zemel v. Rusk*, 381 U. S. —, —, we "have consistently held that only a compelling [governmental] interest in the regulation of a subject within [governmental] constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP v. Button*, 371 U. S. 415, 438. The Government's brief expressly disavows any support for this statute "in large public interests such as would be needed to justify a true restriction upon freedom of expression or inquiry." Rather the Government argues that, since an addressee taking the trouble to return the card can receive the publication named in it, only inconvenience and not an abridgment is involved. But inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government. See, *e. g.*, *Freedman v. Maryland*, 380 U. S. 51; *Garrison v. Louisiana*, 379 U. S. 64; *Speiser v. Randall*, 357 U. S. 513. The registration requirement which was struck down in *Thomas v. Collins*, 323 U. S. 516, was not appreciably more burdensome.

Moreover, the addressees' failure to return this form results not only in nondelivery of the particular publication but also of all similar publications or material. Thus, although the addressee may be content not to receive the particular publication, and hence does not return the card, the consequence is a denial of access to like publications which he may desire to receive. In any event, we cannot sustain an intrusion on First Amendment rights on the ground that the intrusion is only a minor one. As the Court said in *Boyd v. United States*, 116 U. S. 616, 635:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

The Government asserts that Congress enacted the statute in the awareness that Communist political propaganda mailed to addressees in the United States on behalf of foreign governments was often offensive to the recipients and constituted a subsidy to the very governments which bar the dissemination of publications from the United States. But the sensibilities of the unwilling recipient are fully safeguarded by 39 C. F. R. § 44.1 (a) (Supp. 1965) under which the Post Office will honor his request to stop delivery; the statute under consideration, on the other hand, impedes delivery even to a will-

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ing addressee. In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose. Cf. *Butler v. Michigan*, 352 U. S. 380. The argument that the statute is justified by the object of avoiding the subsidization of propaganda of foreign governments which bar American propaganda needs little comment. If the Government wishes to withdraw a subsidy or a privilege, it must do so by means and on terms which do not endanger First Amendment rights. Cf. *Speiser v. Randall*, *supra*. That the governments which originate this propaganda themselves have no equivalent guarantees only highlights the cherished values of our constitutional framework; it can never justify emulating the practice of restrictive regimes in the name of expediency.

MR. JUSTICE HARLAN concurs in the judgment of the Court on the grounds set forth in this concurring opinion.

OFFICE COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 848

JOHN F. FIXA, INDIVIDUALLY AND AS POST-
MASTER, SAN FRANCISCO, CALIFORNIA, ET
AL., APPELLANTS,

vs.

LEIF HEILBERG

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

FILED JANUARY 19, 1965

PROBABLE JURISDICTION NOTED FEBRUARY 1, 1965

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
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[fol. 1] [File endorsement omitted]

Marshall W. Krause
Staff Counsel
American Civil Liberties Union
of Northern California
503 Market Street
San Francisco 5, California
EXbrook 2-4692,
Attorney for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.**

No. 41660

**Action for Injunctive and Declaratory Relief
Three Judge Court Requested**

LEIF HEILBERG and MARSHALL W. KRAUSE, Plaintiffs,

v.

JOHN F. FIXA, individually and as Postmaster, San Francisco, California; J. EDWARD DAY, individually and as Postmaster General of the United States; GEORGE BROKAW, individually and as Collector of Customs, San Francisco, California; DOUGLAS DILLON, individually and as Secretary of the Treasury of the United States, Defendants.

COMPLAINT—Filed July 30, 1963

Plaintiff Heilberg for a cause of action alleges:

I

That this is a suit for declaratory relief and to enjoin the enforcement of 39 U.S.C. § 4008 [Pub. L. 87-793] regulating the mailing of "communist political propaganda." Said statute is set out as "Exhibit A" attached hereto. This Court has jurisdiction over the subject matter thereof and the defendants herein under 28 U.S.C. §§ 1339, 1346,

1356, 1391 (e), 2201, 2202, Article III, Section 2 of the Constitution of the United States, and the First and Fifth Amendments to the Constitution of the United States.

II

There now exists an actual justiciable controversy between plaintiff, who is a resident of this judicial district, and defendants concerning the receipt and mailing of "communist political propaganda." Plaintiff, as further described below, will suffer immediate and irreparable injury if the relief prayed for is not granted.

III

The defendants, and each of them, in their captioned official capacities are charged with the enforcement of the provisions of 39 U.S.C. § 4008 by the terms of the statute itself or, as to defendants Fixa and Brokaw, by the orders, regulations and instructions of their superiors, and have enforced and threaten to continue to enforce said law in the manner hereinafter described even though, for the reasons hereinafter described, said law is void and unconstitutional.

IV

On or about July 12, 1963, plaintiff Leif Heilberg received a letter through the United States mail from the defendant Fixa on a card marked POD Form 2153-X containing the following message:

Message to Addressee

This office is holding unsealed mail matter addressed to you from a foreign country. Under Public Law 87-793, the Secretary of the Treasury has determined this mail to be Communist political propaganda. It cannot be delivered to you unless you have subscribed to it, or otherwise want it. Please check the appropriate spaces under "Instructions" on this card and return the card. If your reply is not received by the date indicated, it will be assumed that you do not want to receive the publication(s) listed, or any similar publication. This mail will then be destroyed.

Postmaster.

Said card further stated that the mail matter addressed to plaintiff Heilberg being detained was "A Proposal Concerning The General Line of the International Communist Movement." Said card further provided four boxes for the addressee to check and return the card to defendant Fixa as follows:

Deliver: — this publication
— similar publication

Do Not Deliver: — this publication
— similar publication

[fol. 3] Said card further stated that unless a reply from addressee was received by August 2, 1963, said detained mail matter will be destroyed. A photograph of this card is attached to this complaint as Exhibit B and incorporated herein. Plaintiff has not returned said card.

V

Plaintiff Heilberg did not order said detained matter; however, he desires to receive this piece of mail and all mail addressed to him in the regular course of the post without said mail being delayed, labeled, read, screened, passed, detained, destroyed, or otherwise processed pursuant to the terms of 39 U.S.C. §4008.

VI

Plaintiff is informed and believes and on this basis alleges that one or more of the defendants maintains a list or card file of those persons who signify a willingness to have delivered to them "Communist political propaganda" and that if plaintiff signifies a willingness to accept the material described in Paragraph IV, above, or similar publications that his name will be added to said list. Plaintiff does not wish to have his name on any list of persons signifying a willingness to accept "Communist political propaganda" because the presence of his name on such a list will unfavorably and unfairly stigmatize him as a person who desires to have Communist propaganda sent to him and therefore might be in the category of persons considered disloyal to the United States of America, "soft on communism", weak-minded, and other derogatory categories

all to his embarrassment and damage to his reputation and ability to earn a livelihood.

VII

Plaintiff further alleges that his right to privacy of person and political opinion and his freedom of speech and association under the First Amendment are abridged by 39 U.S.C. § 4008 since he must either lose his right to receive unsolicited mail matter which the defendants or any of them decide falls within the restrictions of 39 U.S.C. § 4008, or he must allow his name to be placed on the list mentioned in paragraph VI, above. The use of said list is [fol. 4] not restricted in any manner by law but is available to all persons, law enforcement agencies, Congressional committees, government agencies, and newspapers and other public information media. Plaintiff alleges that if he allows his name to be added to said list he will be subjected to investigation, intimidation, public notoriety, all in violation of his rights to privacy and freedom of association.

VIII

Unless restrained by this court the defendants will destroy the copy of "A Proposal Concerning The General Line of the International Communist Movement" if a reply to POD Form 2153-X is not received by August 2, 1963. Unless enjoined to do so by this court defendants will not deliver said literature to plaintiff unless he requests delivery and complies with the requirements of 39 U.S.C. § 4008.

Plaintiff Marshall W. Krause for a cause of action alleges:

IX

Paragraphs I, II and III, above, are hereby realleged as if set out here in full.

X

Plaintiff Marshall W. Krause has in his possession a copy of the magazine entitled "Peking Review," dated June 21, 1963 and numbered Volume VI, No. 25. Said magazine is subtitled "A Weekly Magazine of Chinese News and Views" and is published weekly by Peking Re-

view, *Pai Wan Chuang*, Peking (37), China. Said magazine is edited, printed and published in the People's Republic of China and the particular copy in the possession of plaintiff was mailed to him at his request by the publisher from Peking, China.

XI

Plaintiff is informed and believes and on this basis alleges that the defendants in this action have determined pursuant to authority granted them by 39 U.S.C. § 4008 [see Exhibit A attached hereto] that each and every issue of the *Peking Review* is "communist political propaganda" subject to the detention provisions of said statute and not addressed for delivery pursuant to a reciprocal cultural [fol. 5] international agreement.

XII

Plaintiff Marshall W. Krause has in his possession a copy of *The New York Times Western Edition* dated July 5, 1963. Said publication is a newspaper of general circulation in the western portion of the United States of America and is published and edited in New York, New York and printed in Los Angeles, California. Said copy of the *New York Times Western Edition* contains therein at pages 4, 5 and 6 an article which is therein stated to be the complete text of a letter sent on June 14, 1963 by the Central Committee of the Chinese Communist Party to the Central Committee of the Communist Party of the Soviet Union as printed in English in the Chinese weekly *Peking Review*. Said letter of June 14, 1963 is printed in the June 21, 1963 edition of the *Peking Review* described in paragraph X above.

XIII

Said copy of the *New York Times Western Edition* contains matter, to wit the letter reprinted from the *Peking Review* of June 21, 1963, which defendants have determined pursuant to authority granted them by 39 U.S.C. § 4008 to be "communist political propaganda" subject to the detention provisions of said statute.

XIV

Plaintiff desires to deposit, unsealed, in the United States Mail his copies of the *Peking Review* for June 21, 1963 and the *New York Times Western Edition* for July 5, 1963. Plaintiff desires to deposit said mail unsealed because the postage fee required for unsealed mail containing only newspapers or periodicals is substantially less than the postage fee required for sealed mail of the same weight. Plaintiff wishes to address the copies of said publications to a friend residing in the United States who has not indicated a desire for said publications, does not subscribe to said publications, and is not a United States Government agency, public library, college, university, graduate school, scientific or professional institution for advanced studies, or any official thereof. Plaintiff wishes to endorse said [fol. 6] mail with his name and address so that he is known as the sender thereof.

XV

Plaintiff has refrained from depositing said periodicals in the United States Mail in accordance with his desires for the sole reason that pursuant to 39 U.S.C. § 4008 the defendants herein threaten to and will detain said mail and notify the addressee that he has been sent "communist political propaganda." Plaintiff does not wish to be identified by an agency or official of the United States Government as a sender of "communist political propaganda" for the following reasons:

1. Such identification tends to create political hostility which is embarrassing to plaintiff and may cause him to be shunned or suspected to be disloyal to his government.

2. Such identification is political censorship of plaintiff's mail.

3. Such identification may prejudice the mind of the addressee of said materials so that he may not agree to receive them or may not read them, both to the detriment of plaintiff's right to freely communicate with other persons.

Further, plaintiff does not wish his mail detained and delayed in its delivery because an agency of the government has decided that it is "communist political propa-

ganda." Plaintiff is informed and believes and on this basis alleges that mail detained under the provisions of 39 U.S.C. § 4008 is delayed for periods of from one day to several weeks.

Allegations of Unconstitutionality by Both Plaintiffs

XVI

39 U.S.C. § 4008 is unconstitutional and void on its face and said fact should be declared by the judgment of this court and the defendants herein perpetually enjoined from [fol. 7] enforcing its provisions for the following reasons:

1. It violates plaintiff's rights to freedom of speech, press, association and privacy as protected by the First Amendment to the Constitution of the United States.

2. It deprives plaintiff Leif Heilberg of due process of law under the Fifth Amendment to the Constitution of the United States because the exemption of officials of United States Government agencies, public libraries, colleges, universities, graduate schools, scientific or professional institutions for advanced studies is an arbitrary classification discriminating against him and categorizing him into a group assumed to be less able to distinguish propaganda than other persons similarly situated as to ability, education and political understanding.

3. It violates the due process clause of the Fifth Amendment to the Constitution of the United States because the standards for the determination of what is "communist political propaganda" are vague, uncertain, and do not provide the opportunity for notice or hearing.

XVII

Plaintiffs have no adequate remedy at law to protect them from the effects of said defendants enforcing 39 U.S.C. § 4008 and will suffer irreparable injury unless their rights are declared and they are granted injunctive relief as prayed below.

Wherefore, plaintiffs pray:

1. For a temporary restraining order restraining defendants and each of them from destroying or dis-

posing of the written matter entitled "A Proposal Concerning the General Line of the International Communist Movement" now in the possession of defendant Fixa;

2. For a judgment declaring that plaintiff Leif Heil- [fol. 8] berg has the right to receive any and all mail addressed to him in the regular course of the post without said mail being processed pursuant to the terms of 39 U.S.C. § 4008;

3. For a judgment declaring that plaintiff Marshall W. Krause has the right to deposit any and all mail in the United States Mail subject to the laws and regulations governing the same but without said mail being processed pursuant to the terms of 39 U.S.C. § 4008;

4. For the convening of a three judge court and the entry of judgment by that court permanently enjoining defendants and their agents from enforcing or executing the provisions of 39 U.S.C. § 4008 on the basis that said statute is in conflict with the Constitution of the United States;

5. For costs of suit herein and other and further relief as shall be just and proper.

/s/ Marshall W. Krause, Attorney for Plaintiffs.

Date: July 30, 1963.

[fol. 9]

EXHIBIT A TO COMPLAINT

§ 4008. Communist political propaganda.

"(a) Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be 'communist political propaganda', shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which

is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

“(b) For the purposes of this section, the term ‘communist political propaganda’ means political propaganda, as defined in section 1 (j) of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611 (j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951 or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620 (f) of the Foreign Assistance Act of 1961, as amended.

“(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material whether or not ‘communist political propaganda’ addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government mails an equal amount of material for delivery in any country described in subsection (b).”

[Vol. 10]

EXHIBIT B TO COMPLAINT

A 2896

INSTRUCTIONS

Aug. 2, 1963

(Date)

DELIVER

☐ THIS PUBLICATION☐ SIMILAR PUBLICATION

DO NOT DELIVER

☐ THIS PUBLICATION☐ SIMILAR PUBLICATION

"A Proposal Concerning The General
Line of The International Communist
Movement" 1963, 1 copy

MESSAGE TO ADDRESSEE

This office is holding unsealed mail matter addressed to you from a foreign country. Under Public Law 87-733, the Secretary of the Treasury has determined this mail to be Communist political propaganda. It cannot be delivered to you unless you have subscribed to it, or otherwise want it. Please check the appropriate spaces under "Instructions" on this card and return the card if your reply is not received by the date indicated, it will be assumed that you do not want to receive the publication(s) listed, or any similar publication. This mail will then be destroyed.

(Detach Here)

Leif Heilberg
1801 Page Street
San Francisco 17, Calif.

Postmaster

[fol. 11] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

No. 41660

~~MOTION FOR ORDER GRANTING PRELIMINARY INJUNCTION—~~
Filed July 31, 1963

To Cecil F. Poole, United States Attorney and attorney
for each of the above defendants:

You will please take notice that on Friday, August 2, 1963, at 9:45 A.M. in the Law and Motion courtroom of the above court, plaintiff Leif Heilberg, by his attorney, will move for an order granting a preliminary injunction against the defendant Fixa and his agents and subordinates in the form attached hereto restraining and enjoining during the pendency of this action said defendant from destroying or otherwise disposing of a certain document entitled "A Proposal Concerning the General Line of the International Communist Movement" now in the possession of defendant Fixa and his agents and subordinates. Said motion will be based upon the memorandum of au-[fols. 12-14] thorities filed herewith, the complaint filed in the above action, the affidavit of counsel filed herewith, and such additional matter, oral or documentary, as shall be presented at the hearing on said motion.

Date: July 31, 1963

/s/ Marshal W. Krause, Attorney for Plaintiffs.

Acknowledgment of service (omitted in printing.)

[fol. 15] ATTACHMENT TO MOTION FOR ORDER GRANTING
PRELIMINARY INJUNCTION—Filed July 31, 1963

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41660

LEIF HEILBERG and MARSHALL W. KRAUSE, Plaintiffs,

v.

JOHN F. FIXA, individually and as Postmaster, San Francisco, California; J. EDWARD DAY, individually and as Postmaster General of the United States; GEORGE BROOKAW, individually and as Collector of Customs, San Francisco, California; DOUGLAS DILLON, individually and as Secretary of the Treasury of the United States, Defendants.

Affidavit of Counsel

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

Marshall W. Krause declares and says:

That he is the attorney for plaintiff Leif Heilberg in the above action.

That he has in his possession the original of the letter on POD Form 2153-X attached to the complaint herein as "Exhibit B" and that defendant Fixa therein threatens to destroy a certain document, to wit: "A Proposal Concerning the General Line of the International Communist Movement," unless plaintiff Heilberg completes said form and returns it to defendant Fixa by August 2, 1963, and indicates thereon that he wishes to receive "Communist political propaganda."

That unless defendant Fixa is enjoined during the pendency [fol. 16] of this action from carrying out said threatened destruction, the subject matter of the above action as to the plaintiff Heilberg will be destroyed and there will be no way to test the legality of the defendants' actions in implementing 39 USC 4008.

That affiant believes that 39 USC 4008 is unconstitutional.

tional and threatens to abridge plaintiff's rights under the First and Fifth Amendments to the United States Constitution.

Dated: July 31, 1963

Marshall W. Krause.

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

On this 31st day of July in the year one thousand nine hundred and sixty three before me, Maude W. Nash, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Marshall W. Krause known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in the City and County of San Francisco the day and year in this certificate first above written.

Maude W. Nash, Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires October 14, 1966.

[fol. 17] [File endorsement omitted].

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Before: Honorable Lloyd H. Burke

No. 41660

LEIF HEILBERG and MARSHALL W. KRAUSE, Plaintiffs,

VS.

JOHN F. FIXA, ET AL., Defendants.

**Transcript of Hearing on Motion for Order Granting Preliminary (Temporary) Injunction (Restraining Order)—
Friday, August 2, 1963.**

[fol. 18] APPEARANCES:

Marshall W. Krause, Staff Counsel, American Civil Liberties Union of Northern California on behalf of Plaintiffs.

Charles Elmer Collett, Assistant United States Attorney on behalf of Defendants.

[fol. 19] Proceedings

The Clerk: Leif Heilberg, et al, versus John F. Fixa.

Mr. Krause: Marshall Krause for the moving party,
Your Honor.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: At this point is there any particular problem as to what should be done? I have contacted the Chief Judge of the Circuit Court through his secretary, and he is in Denver and will not be back until Monday for the purpose of designating the member of the Court of Appeals and another District Court Judge.

Mr. Collett: I would assume, Your Honor, that you have made some sort of a determination in your own mind that there is a substantial issue presented here which requires you to request the appointment of a three-judge court.

The Court: I think the issue is substantial enough to require we convene—

Mr. Collett: Is Mr. Heilberg here?

Mr. Krause: Yes, Mr. Heilberg is here.

Mr. Collett: Will you have him come forward, please.

Mr. Krause: I do not understand—

Mr. Collett: Will you have him come forward.

The Court: Mr. Collett, if you have anything to say, [fol. 20] you direct it to the Court.

Mr. Collett: Yes, Your Honor.

I call Your Honor's attention to the complaint which is filed. Paragraph 5. Mr. Heilberg desires to receive this piece of mail so I— At this time I hand the letter to him—

Mr. Krause: I do not think—

Mr. Collett: —in accordance with the Section that is involved here, 4008 of Title 39 which determines that if he desires the article which is involved, why, the Postmaster may deliver it to him.

The Court: To what part of the complaint did you refer?

Mr. Collett: Paragraph 5 on page 3.

Mr. Krause: If we could read that, Your Honor. May I read it? Plaintiff Heilberg—

The Court: I can read.

All right.

Mr. Krause: May I call your attention to the last phrase in that paragraph.

“... without said mail being delayed, labeled, read, screened, passed, detained, destroyed, or otherwise processed pursuant to the terms of 39 U.S.C. 4008.”

Mr. Collett is attempting to tell us that he can avoid any [fol. 21] test of this particular statute merely by delivering the material involved any time someone files suit. If this were allowed to continue, Your Honor, Mr. Heilberg would have to file suit every time he receives a piece of mail from a country pursuant to the terms of this statute, whose mail is foreign propaganda. This is an intolerable situation and I do not think that the Court should stand for this sort of thing because it means that this particular legislation could never be tested as to its validity.

The Court: As I recall, the statutory requirement of the

application of the declaratory relief is that there must be an actual controversy either pending or in existence.

Now, where is the controversy here except your interest in finding a vehicle for determination of the constitutional issue?

Mr. Krause: The actual controversy is the constitutional issue. If the issue can be avoided, it means that we are faced with a multiplicity of suits. If we have to dismiss our suit any time that the mail is delivered—I think you can see, Your Honor, that it absolutely prevents any test of this statute which I do not think—

The Court: It may be that you can get a test of the statute but you may have to get it through a case which [fol. 22] arrives in a different posture.

Mr. Krause: Let me also say this: We have alleged in the complaint that the authorities here, the post office and the customs department, maintain a list of persons who are willing to receive Communist political propaganda. We have alleged that the existence of this list is a threat to the personal liberties of the plaintiff, Mr. Heilberg, because his name on that list may subject him to violations of his privacy by having his name linked with persons wishing to receive Communist political propaganda resulting in derogatory consequences such as being considered sympathetic to Communism just because your name is on this list, being subjected to investigations, being called before committees. This list, which we are prepared to prove the existence of, is a justiciable controversy, regardless of whether the mail is here or not. And I would add to that, Your Honor, that we have asked for a declaration of the invalidity of the particular statute which would come up whether we are dealing with one particular piece of mail or the future delivery of mail. I do not think that the government can avoid a test of this legislation merely by delivering the piece of mail when suit is filed because, then, they consider that to be a request under the statute and this is the very statute we are trying [fol. 23] to test the validity of.

The Court: I do not think there is any illusion on the part of anyone as to what your intention is. The question is whether or not this action may stand at this time under these circumstances.

We will take a short recess at this point.

(Recess taken.)

[fol. 24] The Clerk: Leif Heilberg, et al, versus Fixa.

The Court: Gentlemen, this matter comes before me this morning on the basis of an order shortening time which is signed by Judge Sweigert on the basis of the affidavit indicating the possibility of irreparable harm or injury.

Is there any question at this point insofar as the temporary restraining order is concerned since the subject matter of the action described in the complaint and in the affidavit is no longer in the possession of the postal authorities and, therefore, not susceptible to destruction. As far as the temporary order is concerned, the matter is moot.

Mr. Krause: Yes, Your Honor, I would like to raise the point—

Mr. Collett: Well, yes, what?

The Court: Mr. Collett.

Mr. Collett: Is he saying yes he is agreeing—

The Court: Let him state his position.

Mr. Krause: Thank you, Your Honor.

The material in question, as far as I know, is not in our possession because we do not accept any attempt to give it to us because it is processed, Your Honor, according [fol. 25] to the terms of the statute which we claim to be unconstitutional.

The Court: Will you tell me how this Court can undo what has already been done if what you say is correct by way of a temporary restraining order? I cannot say I am restraining what you have already done, Mr. Fixa.

Mr. Krause: It is this: The subject matter of this suit, it is true, is the particular piece of mail.

The Court: Just a moment, now. All we are talking about now is the purpose of the hearing this morning which is to determine whether or not I can with propriety under the provisions of Title 28 issue a temporary restraining order. Now, whether or not there is or is not merit to the action from the standpoint of the complaint is a matter which can be disposed of at some other time.

Mr. Krause: I understand that, Your Honor. The point

that I wish to make here is that the restraining order can issue an order to preserve the subject matter of the suit which, if it does not exist, there will be no suit.

Certainly, the next step here, as I think we can all comprehend, is for the United States Attorney to come in and move for summary judgment on the basis the suit is moot and the motion has some merit to it. I am not saying that it will be granted, but it certainly has some merit to it. [fol. 26] And I think Your Honor can take notice of the fact that this is what is going to happen.

To present the subject of the suit, Your Honor, we do not accept this piece of mail. Mr. Fixa cannot get rid of it by merely throwing it out on the street. That is precisely what the subject of this restraining order is.

The Court: The subject of this hearing is whether or not a temporary restraining order is necessary to preserve the status of the parties and preserve the property in question pending a determination as to the validity of the claim of unconstitutionality by a three-Judge Court.

Now, this morning it is apparently conceded that the subject matter of a temporary restraining order is no longer in the possession of the government.

Mr. Krause: No, sir, I do not concede that. I beg to differ with you. It is true that Mr. Collett has brought in a package. I do not know what it contains. I do not know whether it is the subject matter of this litigation, Your Honor. He just then tried to foist it off on us, but we have not accepted it, Your Honor. It is as if Mr. Fixa would throw it out of the window and say: I don't have it anymore.

The preliminary injunction is to restrain him from de-[fol. 27] stroying it and disposing of it. It seems to me he is attempting to dispose of it right now in Court.

The Court: Your client says he wants it and he won't sign the necessary forms according to the statute. The government has relinquished it. I do not say that disposes of the question as to whether or not the action dies with that disposition. I have serious doubt as to whether it does. At any rate, that is not the question which can be disposed of at this hearing. That would be disposed of on appropriate motion with proper notice of the hearing. 284 says that at least five days notice of the hearing shall be given to the Attorney General of the United States,

the United States Attorney for the District and such other persons who may be defendants.

Although I make no pretense of having peculiar experience in this type of action, I am not sure that you can name the Secretary of Treasury and the Postmaster in this District.

Isn't there some provision that applies to this type of action?

Mr. Collett: There has been a new section, Your Honor, which is cited in his first paragraph, 1291, I believe it is, which permits service upon the Postmaster General by certified mail and the action may be filed in the District where the—

[fol. 28] The Court: How about the Secretary of Treasury?

Mr. Krause: 1391(e), Your Honor.

Mr. Collett: Excuse me, Mr. Krause.

There is no question Your Honor is right, that 1294—1284 has not been complied with here. It is necessary to give five days notice to the Attorney General of the United States and the offices of the United States which are named. Now, Your Honor has used the expression temporary restraining order. Actually, this is not an application for a temporary restraining order. It is an application for a preliminary injunction, and a preliminary injunction is pending the disposition of the ultimate issues. And that cannot be determined by this Court, it has to be determined by a three-judge court if there is anything to be presented to a three-judge court.

The Court: The motion does properly refer to a preliminary injunction but I do not think there is any question from reading the affidavit and the motion in its entirety that this was intended to be a motion designed to give relief in the form of a temporary restraining order pending a hearing on the preliminary injunction.

Mr. Collett: It does not say that. It says during the pendency of this action. These are the words he used. That is what it says and I do not see how it can be construed to be anything else. There is no ambiguity about [fol. 29] it. It says during the pendency of this action. It is an application for an interlocutory or an injunction pending—

The Court: I think there is sufficient allegation of pro-

spective injury, not in the serious sense, but at least there was the allegation that the mail would be destroyed today absent of some action by the Court.

My view is that under these circumstances the order shortening time produces nothing in the way of a basis for a temporary restraining action by this Court. It just goes on the regular calendar. I think the three-judge court would have to hear the motion. I do not think there is anything to do this morning.

Mr. Krause: Let me say this, Your Honor: that the time limits on this thing are very stringent. The person who is the recipient of the mail gets 20-days notice that it is being held awaiting his instructions on the card sent. Now, by the time the recipient of the mail gets to an attorney and the attorney can figure out what can happen and the suit can be filed the time is very short and that is why I got an order shortening time. The allegation is, according to the official information given by the post office department, that this piece of mail will be destroyed unless something is done today. Today is the last day on which something can be done. Under these rather extraordinary circumstances, it is not inappropriate to get an order shortening time, it is not inappropriate for the Court to hear the matter on its merits.

The Court: I cannot hear it on its merits. The only thing I can do at this point is to preserve the subject matter of the litigation.

Mr. Krause: Yes, that is what I mean, the merits of the motion, not the merits of the lawsuit.

The Court: Now the motion has no merits because there is nothing in danger.

Mr. Krause: We are still suffering the same detriment, however.

The Court: Isn't that the thrust of your original complaint? It has nothing to do with this particular item of property.

Mr. Krause: Only if you assume, Your Honor, that this material is now in the possession of the plaintiff, which I do not assume, and I do not understand how you can assume it.

The Court: Because it has been offered to him and it was made available to him with absolutely no conditions imposed. If you can offer evidence to support the propo-

sition that what the government has made available here and say they have got something else, then, we can con- [fol. 31] tinue with the hearing, but I assume there is no question as to the good faith in the representations, by government counsel that this is the material to which your motion is directed.

Mr. Collett: Will the Court have Mr. Krause either say that it is or is not at this time.

Let's not have any fooling around. Let's not play games here. It was given to him; the man who identified himself as the plaintiff, and he took it into his hands and received it, and I gave it to him on behalf of Mr. Fixa. If there is any question about this tactic, let Mr. Krause say so.

The Court: That is not an unreasonable requirement. Your order shortening time is predicated on the representation that certain material is in danger of physical destruction.

Mr. Krause: Yes.

The Court: You know what the material is, I assume.

Mr. Krause: Now there has been an abrupt change of circumstances.

The Court: Eliminating the necessity of a temporary injunction and allowing you with a complaint which has been on file and which is still on file.

Mr. Krause: I can see Your Honor's point. But I once again urge that the Court be somewhat more farsighted [fol. 32] in this matter and realize what the intention of the government is in this entire litigation. It is true that we are just hearing a motion for a preliminary injunction or a temporary restraining order; whatever it be termed. However, the intent of the government in delivering this material is obviously to make the suit moot, Your Honor.

The Court: Does it make it moot? That is a question which is going to be determined later on on motion for summary judgment.

Mr. Krause: If it is the entire subject matter of the litigation—

The Court: According to your complaint, it isn't.

Mr. Krause: Mr. Heilberg's cause of action. There is more than one cause of action. On his cause of action it is the subject matter of his cause of action and the consequences flowing from this.

The Court: The statute imposes very rigid controls on

the District Court insofar as restraint imposed on any government officials. The provisions as to notice are quite clear. The notice in this case was shortened, time of notice was shortened, only because of the alleged emergency insofar as these particular items of property may have been concerned. Now that they are no longer in danger or unless you are in a position to establish the fact that there is something other than what has been offered by the [fol. 33] government unconditionally, I just do not feel there is any justification in the law or in logic for me at this time to take action where the notice to the government does not comply with the statutory provisions of Section 2284.

Mr. Krause: I am not going to further argue the point, Your Honor. You seem to have made up your mind.

The Court: Do you acquiesce in the proposition, though, that this material is the material to which your motion was directed?

Mr. Krause: No, sir, I do not.

The Court: All right, then, put in evidence to establish to the contrary.

Mr. Krause: I have no evidence to offer, Your Honor.

The Court: Does the government represent that there is nothing in the possession of the Postmaster named in the complaint?

Mr. Collett: Subject to this suit, yes, Your Honor. This is it.

The Court: If this motion, entitled Motion for Order Granting Preliminary Injunction, was designed to effect an order for temporary restraint imposed upon the Postmaster to prevent destruction of the mail matter, the motion is denied. It is not the intent, however, of the Court, [fol. 34] to order anything which will affect the initial action except to the extent that absence of the material itself may give rise to a national defense.

Mr. Collett: If the Court please, will you direct your attention now just to one further question. The way that motion is worded, it would be my view that the motion is for a preliminary injunction which can only be granted by a three-judge court. A three-judge court is in accordance with Sections 2284 and 2281 of Title 28 and requires the Court to make determination that there is a substantial constitutional question presented to require the convening

of a three-judge court. Also, it requires a substantial showing that there is irreparable damage being involved.

If Your Honor has determined this is an application actually for a temporary restraining order that was not granted—

The Court: Mr. Collett, I have no authority to make any determination as to the ultimate question of substantial constitutional question at this time. The government has not received the required notice for any such hearing.

Is that true?

Mr. Collett: That is true. But the section calls for you to advise the Chief Judge even notwithstanding the ab-
[fol. 35] sence of notice might be raised as an infirmity as far as the proceedings are concerned. But you have to make a determination that there is a substantial constitutional question before you request—

The Court: I think I indicated at the start of the hearing that in the posture of the case as it stood in the initial phase of this hearing I thought there was a substantial question. Now, whether or not the absence of subject matter of the suit, the material itself, changes that position, I do not know. I do not think there is any reason to determine it now until the government has had its five days notice and this comes up in the normal course of events.

RULING DENYING APPLICATION, ETC.

Mr. Collett: The application which is now before Your Honor, whether it is a preliminary or temporary restraining order, is denied?

The Court: Is denied.

[fol. 36]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

No. 41660

ORDER DENYING THE MOTION FOR ORDER GRANTING PRELIMINARY (TEMPORARY) INJUNCTION (RESTRAINING ORDER)—
August 2, 1963.

On July 30, 1963 plaintiffs filed an action for injunctive and declaratory relief predicated upon alleged unconstitutionality of Title 39 U.S.C. § 4008 regulating the mailing of "Communist Political Propaganda". Plaintiffs' prayer included a request for a temporary restraining order restraining defendants from destroying or disposing of certain written matter entitled "A Proposal Concerning the General Line of the International Communist Movement" allegedly in the physical possession of the defendant John F. Fixa. On July 31, 1963 plaintiffs filed a motion for order granting preliminary injunction and obtained an order shortening time for notice of hearing on said motion on Friday, August 2, 1963. Although described as a motion for an order granting a preliminary injunction it was considered by this court as a motion for a temporary restraining order pursuant to Title 28 U.S.C. § 2284, par. 3, to prevent irreparable damage.

[fol. 37] At the hearing on August 2, 1963, the defendant John F. Fixa, through counsel, gave an unconditional release of physical possession and all claim to the material described in the motion filed on July 31, 1963. Upon representation of government counsel that the material tendered constituted all mail matter described in the above complaint and in the possession of any of the defendants named, plaintiffs conceded the absence of any evidence to the contrary. Therefore, it appearing to the court that subject matter to which a temporary restraining order could be directed is neither in jeopardy of destruction or other disposition as alleged in plaintiffs' motion and is in fact

immediately available to plaintiffs, the motion for order granting preliminary (temporary) injunction (restraining order) is Denied:

Further action by this court with regard to the complaint filed July 30, 1963 will be in accordance with procedure contemplated by Title 28 U.S.C. § 2284 and upon notice as fixed by that section.

Dated: August 2, 1963

Lloyd H. Burke, United States District Judge.

[fol. 38] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

DEFENDANTS' MOTION TO DISMISS—Filed September 30, 1963

Comes now the defendants, and each of them, and move to dismiss the complaint and action filed herein on the following grounds:

I

As to the cause of action of the plaintiff Leif Heilberg, (a) on the grounds that the complaint does not state a claim upon which relief can be granted; and (b) that said action is moot.

II

As to the plaintiff Marshall W. Krause, on the grounds (a) that the complaint does not state a claim upon which relief can be granted, and (b) that the above Court is without jurisdiction of the subject matter.

Dated: September 30, 1963.

Cecil F. Poole, United States Attorney. By /s/
Charles Elmer Collett, Assistant United States
Attorney, Attorneys for Defendants.

[fol. 39] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

Civil No. 41660

AFFIDAVIT OF CHARLES ELMER COLLETT—Filed October 2,
1963

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

Charles Elmer Collett, being first duly sworn, deposes
and says:

1. That he is an Assistant United States Attorney for
the Northern District of California, and in such capacity is
familiar with the above case;

2. That at the hearing on August 2, 1963 of the above
matter for preliminary injunction, the material described
in the complaint in the cause of action stated by the plain-
tiff Leif Heilberg, and in the motion filed on July 31, 1963,
was delivered unconditionally by affiant to the physical
possession of the plaintiff Leif Heilberg. The representa-
tion of the affiant to this Court at said time was uncon-
troverted, that the material delivered to the possession of
said plaintiff Leif Heilberg constituted all the mail matter
described in the complaint and in the possession of any of
[fol. 40] the defendants named.

3. The above entitled Court in its Order of August 2,
1963 found such statement to be the fact, and that plaintiffs
conceded the absence of any evidence to the contrary.

4. Affiant is informed and believes that the plaintiff
Heilberg has been advised by General Counsel of the Post
Office that all Communist political propaganda addressed
to him will in the future be forwarded without further
inquiry by the Post Office Department.

5. Affiant is informed and believes that appropriate
officials have been instructed that all Communist political

propaganda addressed to plaintiff Heilberg will be delivered to him without further inquiry.

Dated: September 30, 1963.

Charles Elmer Collett, Assistant United States Attorney.

Subscribed and sworn to before me this 1st day of October, 1963: Victor J. Fox Deputy Clerk District Court the U.S. Nor. Dist. of California.

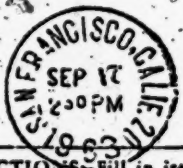
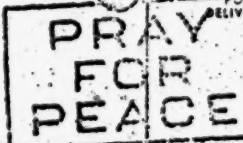
[fol. 41]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

Civil No. 41660

POST OFFICE DEPARTMENT OFFICIAL BUSINESS		PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, \$300	
			
INSTRUCTIONS: Fill in items below and complete #1 on other side, when applicable. Moisten gummed ends and attach to back of article. Print on front of article RETURN RECEIPT REQUESTED.			
REGISTERED NO. 171803		NAME OF SENDER <i>Post Office Dept</i>	
CERTIFIED NO.		STREET AND NO. OR P. O. BOX <i>1111 ST. P. CA AVE NW</i>	
INSURED NO.		CITY, ZONE AND STATE <i>Washington, D.C. 20540</i>	
3811 Jan. 1958 Form 3811		RETURN TO TO	

Gen Counsels CFF Jan 4 1963

[fol. 42] AFFIDAVIT OF LOUIS J. DOYLE, GENERAL COUNSEL
Post Office Department—Filed October 7, 1963

I, Louis J. Doyle, do hereby swear to the following facts:

- 1.) That the administration of § 305 of Public Law 87-793 is vested in my office.
- 2.) That on September 16, 1963, I wrote Mr. Leif Heilberg, 1801 Page Street, San Francisco, California 94117, and Mr. Marshall W. Krause, Staff Counsel, American Civil Liberties Union of Northern California 503 Market Street, San Francisco, California 94105, to inform them that the Post Office Department would no longer detain Communist political propaganda addressed to them. The letters were sent to Mr. Heilberg and Mr. Krause by Registered Mail (Registered Numbers 171802 and 171803, respec-

tively), and a return receipt was received from Mr. Krause, signed by his agent, Lee Anderson, indicating delivery of his letter to him on September 17, 1963. True carbon copies of these letters are attached to this affidavit, along with the returned receipt.

3.) That on September 16, 1963, I sent written instructions to the Postmasters at each of the Communist propaganda screening units, advising them to release all present material held for Mr. Leif Heilberg and Mr. Marshall Krause, and further advising them not to detain any future material addressed to Mr. Heilberg or Mr. Krause. These instructions were sent by regular mail, and there is no reason to believe that the instructions have not been delivered.

Louis J. Doyle, General Counsel.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Sworn to before me this 2nd day of October, 1963.

Lawrence B. Gowen, My Commission expires April 30, 1966.

[fol. '43]

ATTACHMENT TO AFFIDAVIT
September 16, 1963

#1-INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Deliver *ONLY* to addressee

☐ Show address where delivered

(Additional charges required for these services)

RETURN RECEIPT

Received the numbered article described on other side.

SIGNATURE OR NAME OF ADDRESSEE (must always be filled in)

MARSHALL W. KRAUSE

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

Lee Anderson

DATE DELIVERED

ADDRESS WHERE DELIVERED (only if requested in item #1)

7-17-63

CAS-16-71848-4 GPO

Mr. Marshall W. Krause
 Staff Counsel
 American Civil Liberties Union
 of Northern California
 503 Market Street
 San Francisco, California 94105

Dear Mr. Krause:

On July 30, Civil Action No. 41660 was filed in the Federal District Court of the Southern Division, Northern District of California, entitled *Heilberg and Krause v. Day et al.*

It is the opinion of this office that this complaint constitutes an expression of desire by you to receive all of your mail whether or not the Customs Bureau of the Treasury Department considers it to be Communist political propaganda. Since 39 U.S.C. § 4003 states that "... detention shall not be required in the case of matter which is ... otherwise ascertained by the Postmaster General to be desired by the addressee.", I have issued instructions to the postmasters at all foreign propaganda screening points that any mail presently being detained be dispatched and that in the future mail addressed to you not be detained.

Sincerely, (Signed) Louis J. Doyle, General Counsel.

[fol. 44]

ATTACHMENT TO AFFIDAVIT

September 16, 1963

Mr. Leif Heilberg
1801 Page Street
San Francisco, California 94117

Dear Mr. Heilberg:

On July 30, Civil Action No. 41660 was filed in the Federal District Court of the Southern Division, Northern District of California, entitled *Heilberg and Krause v. Day et al.*

This suit challenges the authority of the Postmaster General to detain mail addressed to you and challenges the Constitutionality of the legislation which authorized this detention.

It is the opinion of this office that this complaint constitutes an expression of the desire by you to receive all of your mail whether or not the Customs Bureau of the Treasury Department considers it to be Communist political propaganda. Since 39 U.S.C. § 4008 states that "... detention shall not be required in the case of matter which is ... otherwise ascertained by the Postmaster General to be desired by the addressee.", I have issued instructions to the postmasters at all foreign propaganda screening points that any mail presently being detained be dispatched and that in the future mail addressed to you not be detained.

Sincerely, (Signed) Louis J. Doyle, General Counsel.

[fol. 45] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

Civil No. 41660

[fol. 46] AFFIDAVIT OF LOUIS J. DOYLE, GENERAL COUNSEL
POST OFFICE DEPARTMENT—Filed October 14, 1963

I, Louis J. Doyle, do hereby swear to the following facts:

1.) That the administration of Public Law 87-793 is vested in my office.

2.) That on September 16, 1963, I wrote Mr. Leif Heilberg, 1801 Page Street, San Francisco, California 94117, to inform him that the Post Office Department would no longer detain Communist political propaganda addressed to him. The letter was sent to Mr. Heilberg by Registered Mail (Registered No. 171802), and a return receipt was requested. The attached Post Office Department Form 1510 from the Postmaster at San Francisco, California, states that delivery of the letter was made to that address on September 17, 1963, and was accepted by E. Heilberg.

Louis J. Doyle, General Counsel.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Sworn to before me this 9th day of October, 1963.

Lawrence B. Gowen, My Commission expires April 30, 1966.

[fol. 47]

ATTACHMENT TO AFFIDAVIT

POD Form 1510—Original—Part II Date 9-26-63

INQUIRY FOR THE LOSS OR RIFLING OF MAIL MATTER

Registered No. 171802 () Special Delivery
 (A) Letter Certified No. () Special Handling
 (P) Parcel Insured No. (X) Air Mail
 (Insert "Unnumbered" if 10¢ fee)

() Ordinary C. O. D. No. Charges, \$

Envelope: (A) Long. () Short. () Business reply (Postage to be paid by addressee.)

Complaint Loss Date mailed 9 16 63 4PM Mon
 (Loss or rifling) (Mo.) (Date) (Yr.) (Hr.) (Day of week)

Mailed at Washington, D. C.
 (City and State)

Where deposited Benjamin Franklin Post Office
 (Main office, station, branch, or location of collection box)

Contents (describe fully) and value Letter

Sender: Office of the General Counsel Addressee: Mr. Laif Hailberg
 (Name) (Name)

Post Office Dept. Rm. 228 1801 Page Street
 (St. or P. O. Box or Rural Route No.) (St. or P. O. Box or Rural Route No.)
Washington, D. C. 20260 San Francisco, Calif. 94111
 (City) (Zone) (State) (City) (Zone) (State)

POD Form 1510—Original—Part III Date SEP 27 1963
 POSTMASTER, OFFICE OF ADDRESS:

Please show disposition of the above-described article. C. G. Beall
Postmaster
 (Postmaster at mailing office)

REPLY SEP 30 1963
 Date _____, 19____ Has addressee received article? Yes
 (Yes or No)

(If delivered, show date; if no record, so state Sept. 17, 1963)

If delivered to firm, state accepting employee's name C. Hailberg

If not intact, what was missing?

If C. O. D., give money order No. _____, date _____, 19____)

If undelivered and on hand, state reason _____

If received but not delivered and not on hand, state disposition _____

John F. Hina Claims Section SEP 30 1963
Postmaster (Postmaster at address office)

[fol. 48] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

Civil No. 41660

ORDER DISMISSING AS TO MARSHALL W. KRAUSE AND DENYING
MOTION WITHOUT PREJUDICE AS TO HEILBERG—October
29, 1963.

The motion to dismiss the above complaint and action having come on regularly for hearing this 24th day of October, 1963, Plaintiff Heilberg appearing by his counsel, Marshall W. Krause, and Associate Counsel Coleman Blease, and Plaintiff Krause appearing in propria persona and by Associate Counsel Coleman Blease, the Defendants appearing by Cecil F. Poole, United States Attorney and Charles Elmer Collett, Assistant United States Attorney, before the Honorable Alfonso J. Zirpoli, Judge of the above-entitled Court; and the matter having been argued and submitted, and the Court being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. As to the Plaintiff Marshall W. Krause, the motion to dismiss is granted, and the complaint and action are hereby dismissed.

[fol. 49] 2. As to the Plaintiff Leif Heilberg, the motion to dismiss is denied without prejudice to a presentation of the same motion to a three-judge court, the convening of which will be forthwith requested by this Court.

Dated? October 29, 1963

Alfonso J. Zirpoli, United States District Judge.

[fol. 50] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

DEFENDANTS' MOTION TO DISMISS—Dated December 9, 1963

Comes now the defendants, and each of them, by their attorneys, Cecil F. Poole, United States Attorney and Charles Elmer Collett, Assistant United States Attorney, and move to dismiss the complaint and action filed herein by the plaintiff Leif Heilberg on the following grounds:

I

That the said action is moot.

II

That the complaint does not state a claim upon which relief can be granted.

III

That the Court is without jurisdiction of the subject matter.

IV

That the complaint does not state a substantial question of constitutionality.

V

[fol. 51]

Said Motion will be based on the records and files in this office, together with the affidavits of Charles Elmer Collett, Assistant United States Attorney, and Louis J. Doyle, General Counsel of the Post Office Department, heretofore filed, copies of which are attached hereto.

Dated: December 9, 1963.

Cecil F. Poole, United States Attorney. /s/ Charles
Elmer Collett, Assistant United States Attorney,
Attorneys for Defendants

CERTIFICATE OF SERVICE (omitted in printing).

[fols. 52-59] CLERK'S NOTE

Attachments to "Defendants motion to dismiss"—Affidavits of Charles Elmer Collett and Louis J. Doyle are omitted from the record here. They appear at folios 39-42 and 45-47 supra.

[fol. 60] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41660

[Title omitted]:

PLAINTIFF'S POINTS AND AUTHORITIES IN OPPOSITION TO
MOTION TO DISMISS—Filed December 24, 1963 (omitted
in printing.)

[fol. 61] APPENDIX I TO PLAINTIFF'S POINTS AND AUTHORI-
TIES IN OPPOSITION TO MOTION TO DISMISS

Marshall W. Krause
Staff Counsel
American Civil Liberties Union
503 Market Street
San Francisco 5, California
EXbrook 2-4692,
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41660

LEIF HEILBERG and MARSHALL W. KRAUSE, Plaintiffs,

v.

JOHN F. FIXA, ET AL, Defendants.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Charles Amlin, being duly sworn, deposes and says:

1. I am the plaintiff in an action now pending in the
United States District Court for the Southern District of
California, Central Division challenging the validity of 39
U.S.C. § 4008. The name and number of said action is as

follows: *Charles Amlin v. Leslie N. Shaw*, Acting Postmaster, Los Angeles, California; John F. Fixa, Postmaster, San Francisco, California; J. Edward Day, Postmaster General of the United States; No. 63-635-PH. Said action was filed on May 31, 1963.

2. On or about June 25, 1963, I received the letter attached to this affidavit as Exhibit A and incorporated herein as if set out here in full.

Charles Amlin.

Subscribed and sworn before me this 19th day of December, 1963.

Sheila M. Schaum, Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 1, 1964.

[fol. 62]

EXHIBIT A TO APPENDIX I

Post Office Department
Office of the General Counsel
Washington 25, D. C.
June 24, 1963

Mr. Charles Amlin
1107 Topeka Street
Pasadena, California

Dear Mr. Amlin:

On March 1, 1963, you were notified by the Acting Postmaster at Los Angeles, California, that his office was holding unsealed mail matter; to wit, one copy of *The People's Korea*, addressed to you from a foreign country, which mail matter had been determined by the Secretary of the Treasury to be Communist political propaganda, pursuant to the provisions of P. L. 87-793. You were requested to advise the Los Angeles postmaster if you desired delivery of this and similar publications. You were requested to make known your desires in this matter prior to March 22, 1963. For your convenience, a franked card was furnished you for this purpose.

Likewise, on May 16, 1963, you received a similar notice from the Postmaster at San Francisco concerning a copy of *The People's Korea* addressed to you. You were requested to make known your desires with respect thereto prior to June 4, 1963. Again, for your convenience, a franked card was furnished you for this purpose.

On May 31, 1963, you filed Civil Action No. 63-635-PH in the United States District Court for the Southern District of California against the Acting Postmaster at Los Angeles, Leslie N. Shaw; the Postmaster at San Francisco, John F. Fixa; and the Postmaster General of the United States, J. Edward Day.

In this civil action you state that you desire to receive *The People's Korea* every week; and you further state that you desire to receive all other mail which may be addressed to you in the future which is determined to be Communist political propaganda.

[fol. 63] In accordance with your instructions, all copies of *The People's Korea* addressed to you now in the possession of the Post Office Department are being forwarded to you under separate cover. Also, instructions have been issued to insure that in the future all Communist political propaganda will be sent to you without delay.

Sincerely, Louis J. Doyle, General Counsel.

cc: Francis G. Whelan, Esq., United States Attorney, Los Angeles 12, California. A. L. Wirin, Esq., Fred Okrand, Esq., 257 So. Spring Street, Los Angeles 12, California.

[fol. 64] APPENDIX II TO PLAINTIFFS' POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41660

LEIF HEILBERG and MARSHALL W. KRAUSE, Plaintiffs,

v.

JOHN F. FIXA, individually and as Postmaster, San Francisco, California; J. EDWARD DAY, individually and as Postmaster General of the United States; GEORGE BROKAW, individually and as Collector of Customs, San Francisco, California; DOUGLAS DILLON, individually and as Secretary of the Treasury of the United States, Defendants.

STATE OF NEW YORK,

County of New York, ss.:

Corliss Lamont, being duly sworn, deposes and says:

1. I am the owner and manager of Basic Pamphlets, an unincorporated association engaged in the publication and distribution of pamphlets and other literature on subjects of public interest.

2. On August 13, 1963 Basic Pamphlets instituted an action against the Postmaster General of the United States in the United States District Court for the Southern District of New York to challenge the constitutionality of 39 U.S.C. 4008. The case is entitled *Basic Pamphlets v. The Postmaster General of the United States* (S.D.N.Y. 63 Civ. 2422).

3. On August 30, 1963 the Acting General Counsel of the Post Office Department wrote me the letter annexed hereto as Exhibit A.

Sworn to before me this 22 day of November, 1963

Corliss Lamont.

Jeanette Rosenfeld Notary Public, State of New York, No. 24-3355935, Qualified in Kings County, Cert. filed in New York County.

Commission Expires March 30, 1965.

[fol. 65]

EXHIBIT A TO APPENDIX II

POST OFFICE DEPARTMENT
Office of the General Counsel
Washington, D.C. 20260
August 30, 1963

Dr. Corliss Lamont
c/o Rabinowitz & Bondin
Attorneys at Law
30 E. 42nd Street
New York, New York 10017

Dear Dr. Lamont:

On August 13, 1963, civil action was filed in the Federal District Court of the Southern District of New York against the Postmaster General of the United States on behalf of an organization known as Basic Pamphlets, which, according to the complaint, is owned and managed by you.

This suit challenges the authority of the Postmaster General to detain mail addressed to Basic Pamphlets and challenges the Constitutionality of the legislation which authorized this detention.

It is the opinion of this office that this complaint constitutes an expression of desire by Basic Pamphlets and you as owner and manager to receive all of your mail whether or not the Customs Bureau of the Treasury Department considers it to be Communist political propaganda. Since 39 U.S.C. §4008 states that "... detention shall not be required in the case of matter which is ... otherwise ascertained by the Postmaster General to be desired by the addressee.", I have issued instructions to the postmaster at New York City and to the postmasters at all other foreign propaganda screening points that any mail presently being detained be dispatched and that in the future mail addressed to Basic Pamphlets or to yourself not be detained.

Sincerely, Adam G. Wendul, Acting General Counsel.

[fol. 66] APPENDIX III TO PLAINTIFFS' POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS

Statement of Tyler Abell, Associate General Counsel of the Post Office Department before the Postal Operations Subcommittee of the House Post Office and Civil Service Committee, June 19, 1963.

Good morning Mr. Chairman, and members of the Committee. It is indeed a pleasure for me to appear this morning before this Committee, to report on the Post Office Department's implementation of section 305 of Public Law 87-793.

I have a brief statement, and since I assume that you are interested in the quantity of this material, I also have some statistics. With your permission I will read the statement, which, as I said is brief, and summarize the statistics which are not so brief. However, you may want to include all the statistical data as part of the record.

As this Committee knows, the legislation in question directs the Post Office Department and the Treasury Department to set up a screening procedure to intercept Communist political propaganda and withhold from delivery any that is not desired by the intended recipients.

Generally speaking, Post Office and the Customs Bureau have divided up the work as follows:

1. Customs decides what countries' mail should be screened.
2. Customs decides where screening points should be established.
They are currently at: Chicago, El Paso, Honolulu, Los Angeles, Miami, New Orleans, New York, San Francisco, San Juan, Puerto Rico, and Seattle.
3. Post Office arranges to route all mail from the [fol. 67] designated countries through one of the screening points.
4. At the screening point, postal personnel sort out all exempt mail for immediate dispatch and hold the rest for Customs examination.
5. Customs examines the detained mail to determine what is and what is not propaganda.
6. Non-propaganda is then dispatched, and the prop-

aganda is held for determination by Post Office as to whether or not it is desired by the addressee.

7. Where the desire of the addressee is already known, the mail is handled accordingly. Otherwise a notice (POD Form 2153-X) is sent to the addressee, and the mail is filed awaiting a reply. If a reply is received, the mail is handled according to the request of the addressee. The notice informs the addressee that we must hear from him in 20 days or the material will be destroyed, and it will be assumed that he does not want to receive any of this type of material. Thus, each day we clean our storage bins and destroy all material which has been held 20 days.

Statistics are compiled by the postal people at each of our units, and submitted to headquarters each month. Since this program was just started January 7, the figures for January and February are not too complete; however I can summarize the reports for March, April and May as follows.

[fol. 68] Total of all mail sent to Foreign

-Propaganda Units	8,575,367	pieces
Exempt	4,540,488	pieces
Detained for Customs examination	3,954,092	pieces
Determined by Customs to be propaganda	286,583	pieces
Not propaganda	3,689,401	pieces
Propaganda known to be wanted	261,310	pieces
Propaganda known to be unwanted	8,863	pieces
Notices sent out	8,072	
Notices unreturned	2,882	
Notices returned as undeliverable	917	
Replied:		
Deliver all	1,658	
Deliver none	1,835	
Deliver some	972	

[Vol. 69]

Month of March 1963

	Total of all mail sent to Foreign Prop- aganda Units	Addressed to Gov. Agencies or otherwise exempt	Detained for examination by Customs	Detained mail determined propaganda	Detained mail determined not propaganda	Known to be wanted	Known to be not wanted
New York.....	1,173,689	340,454	833,235	82,417	750,818	79,783	467
Chicago.....	448,265	409,007	39,258	935	38,323	273	103
San Francisco.....	47,489	42,738	4,751	4,058	693	1,058	5
Los Angeles.....	62,573	3,660	58,913	1,293	57,620	419	767
Honolulu.....	none	0	0	0	0	0	0
El Paso.....	708,507	707,967	540	27	513	10	3
New Orleans.....	64,903	18,788	46,115	47	46,068	0	0
Miami.....	40,646	39,041	1,605	277	1,328	105	86
Seattle.....	71,643	9,605	62,038	423	61,614	104	93
San Juan**							
Total	2,617,713	1,571,260	1,046,435	89,477	996,977	81,732	1,531
Laredo*	80,784						

* Laredo preliminarily screens incoming mail from Mexico. Exempt mail is forwarded directly; mail requiring determination by Customs as to whether or not it is propaganda is sent to El Paso and New Orleans.

** No report received from San Juan

Tyler Abell, April 16, 1963.

[fol. 70]

Month of March, 1963

No. of Pieces on which notices sent out	Total No. of notices sent out	Replies		Notices undeliverable	Notices not returned
		deliver all	deliver none		
2,167	2,088	408	332	56	814
554	600	52	83	14	445
2,995	218	117	13	2	46
107	437	70	167	39	198
0	0	0	0	0	0
14	27	5	3	0	19
47	47	0	7	24	40
84	83	26	28	9	15
227	182	33	46	10	74
6,195	3,632	711	679	220	1,654

Month of April, 1963

[fol. 71]

Port	Total of all mail sent to- Foreign Prop- aganda Units	Addressed to Gov. Agencies or otherwise exempt	Detained for examination by Customs	Detained mail determined propaganda	Detained mail determined not propaganda	Known to be wanted	Known to be not wanted
N. Y.	1,393,672	318,514	1,075,155	99,991	975,164	96,539	2,722
Chicago	576,378	478,366	98,012	1,962	96,050	1,231	404
S. F.	142,563	141,283	1,280	1,187	93	159	60
L. A.	66,273	4,979	61,294	1,671	59,623	175	458
Honolulu	813	775	38	38	0	0	0
El Paso	387,961	383,664	4,297	164	4,133	8	8
N. O.	14,809	6,542	8,267	120	8,147	2	85
Miami	10,359	9,376	983	239	744	95	60
Seattle	66,687	9,651	57,036	1,024	56,021	275	572
San Juan	not operating
Total	2,659,515	1,353,150	1,306,362	106,396	1,199,975	97,484	4,369

Note: Laredo screened 303,362 pieces of mail. All were exempt; all were from Mexico.

[fol. 72]

Month of April, 1963

No. of Pieces on which notices sent out	Total No. of notices sent out	Replies			Notices undeliverable	Notices not returned
		deliver all	deliver none	deliver some		
730	730	205	204	199	64	125
1,327	683	104	230	78	20	271
968	391	154	24	50	88	75
1,038	85	21	31	0	20	33
38	38	0	3	0	6	29
148	42	3	2	0	0	37
33	33	0	3	0	0	30
84	64	8	11	10	1	35
177	90	27	31	16	10	16
		not operating				
4,543	2,156	522	539	353	209	651

Port	Total of all mail sent to Foreign Prop- aganda Units	Addressed to Gov. Agencies or otherwise exempt	Detained for examination by Customs	Detained mail determined propaganda	Detained mail determined not propaganda	Known to be wanted	Known to be not wanted
N. Y.	1,403,743	164,134	1,239,609	85,557	1,154,052	81,044	1,244
Chicago	450,845	375,250	75,595	1,140	75,455	255	507
S. F.	166,978	20,884	146,094	1,215	165,763	94	255
L. A.	61,192	6,493	54,699	1,719	52,980	280	475
Honolulu	390	388	2	2	0	2	0
El Paso	398,711	393,682	5,029	239	4,790	164	6
New Orleans	7,561	2,884	4,677	45	4,642	0	5
Miami	1,344	834	510	44	466	6	0
Seattle	88,767	13,707	75,060	759	74,301	229	471
San Juan			Scheduled to start operating June 17				
Total	2,579,431	978,256	1,601,275	90,710	1,532,449	82,074	2,968

Note: Laredo screened 334,460 pieces of mail. All was exempt; all was from Mexico.

[fol. 74]

Month of May, 1963

No. of Pieces on which notices sent out	Total No. of notices sent out	Replies		Notices undeliverable	Notices not returned
		deliver all	deliver none		
3,269	926	37	351	44	506
408	163	79	41	9	13
866	866	202	195	383	
964	126	18	11	7	9
0	0	0	0	0	0
69	48	3	4	6	28
30	30	0	0	28	0
44	35	13	7	6	4
59	40	13	8	5	17
5,709	2,234	365	617	488	577

fol. 75] IN THE UNITED STATES DISTRICT COURT, NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

before: Hon. Homer T. Bone, Judge, Hon. Albert C. Wollenberg, Judge, Hon. Alfonso J. Zirpoli, Judge.

No. 41,660

LEIF HEILBERG, Plaintiff,

vs.

JOHN F. FIXA, et al., Defendants.

Transcript of Hearing on Motion to Dismiss—January 2,
1964

APPEARANCES:

For the Plaintiff: Marshall W. Krause, Esq., and Coleman Blease, Esq.

For the Defendants: Cecil F. Poole, Esq., United States Attorney. By: Charles Elmer Collett, Esq., Assistant U. S. Attorney.

fol. 76] The Clerk: Leif Heilberg versus John F. Fixa, Postmaster, for Hearing on Motion to Dismiss, convened before a duly-constituted three-judge court consisting of The Honorable Homer T. Bone, United States Circuit Judge; the Honorable Albert C. Wollenberg and Alfonso J. Zirpoli, United States District Judges for the Northern District of California as provided by and pursuant to the provisions of 28 United States Code, Section 2884.

Will counsel state their appearances for the record?

Mr. Collett: Charles Elmer Collett of the United States Attorney's Office, for the moving party.

Mr. Krause: Marshall W. Krause for the opposition.

Mr. Blease: Coleman Blease for the plaintiff.

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Bone: Mr. Collett, unhappily for you, you seem to have the burden here of proceeding because your motion is the one that we have to confront first.

Mr. Collett: Yes, that is correct, Your Honor.

Judge Bone: Will you tell us why we should dismiss this case?

Mr. Collett: Yes, Your Honor.

First, Your Honor having called my attention to the fact that there is a motion before the Court and that is the only matter before the Court at this time, Mr. Krause has caused to be served upon the Postmaster, Mr. Fixa, personally a subpoena to bring with him a complete file and list of [fol. 77] persons and organizations and so on, without reading the whole thing, which I consider at this time to be not relevant and not proper, and I would like to be able to instruct the Postmaster that as far as the subpoena is concerned, it may be quashed, or else whatever disposition made of it that the Court thinks to be proper.

Judge Bone: May I inquire if you intend to introduce some testimony?

Mr. Collett: No.

Judge Bone: You have no witnesses?

Mr. Collett: No, this is a motion to dismiss.

Judge Bone: Do your opponents have any witnesses they intend to introduce? We have a bare record here on the question of wilfulness, which is important.

Mr. Collett: The question of wilfulness—

Judge Bone: The man claims he is threatened with something. The injunction is a pretty strenuous remedy.

Mr. Collett: With regard to the mootness, the order of Judge Burke, when it appeared on the hearing before Judge Burke for the temporary restraining order, where the proceedings occurred that the mail matter which is involved here, which I will discuss with the Court on the motion, was delivered.

Judge Bone: Did Judge Burke hear any witnesses?

Mr. Collett: No, other than what transpired before him [fol. 78] in court.

Judge Bone: All on the record?

Mr. Collett: That's right.

Judge Zirpoli: May I be permitted to interject a question at this time?

Judge Bone: Yes.

Judge Zirpoli: Mr. Collett, apropos with your question with relation to witnesses, subpoenaed, and without indicating in any way what may be the ultimate ruling of the

Court, certainly not presuming for the moment to speak for either of the other two distinguished members of this panel, I should like to ask, assuming for the moment that this Court were to find that the case is not moot and were to conclude that there is a proper controversy before it, would it be the intention of the Government to thereafter introduce evidence or take any further steps in order that the Court might properly pass upon the ultimate question, if it should reach that stage?

Mr. Collett: If the Court please, I think if the motion to dismiss at this stage of the case is denied by the Court, it will be necessary then to afford time to answer.

Judge Wollenberg: Correct.

Mr. Collett: And to file an answer.

Judge Wollenberg: There is no pleading here at all. That is what I was going to say.

Mr. Collett: This is a motion to dismiss, like any [fol. 79] number of other motions, and I think that the other record is before the Court.

Judge Wollenberg: Surely.

Judge Bone: That would rest, wouldn't it, Mr. Collett, inevitably on the fact that there is no justiciable controversy here that the Court can take cognizance of?

Mr. Collett: Yes, Your Honor, that is correct. What has transpired, and the facts and the allegations of the complaint, is there any matter actually before this Court to be disposed of? That is the basis of the motion, Your Honors.

Judge Bone: This man, I assume, is getting his mail right along.

Mr. Collett: That is right, Your Honor.

Judge Bone: I am wondering how an injunction would serve any other purpose than in a sense being a declaratory judgment.

Mr. Collett: As it stands now—

Judge Bone: That must rest on something pretty substantial.

Mr. Collett: As it stands now, I would suggest to the Court that there is no problem of an injunction involved here at the present time. There is nothing to be enjoined actually. What is barely before the Court, if anything, is an action which in the first sentence of the first paragraph is a prayer for injunction. I intend to take the allegations

[fol. 80] of the complaint and endeavor to consider just what the plaintiff seek before this Court.

Judge Bone: These are preliminary questions and not to indicate any attitude of mind here because it is difficult for a court like this to have an attitude of mind at this particular stage of the hearing. If there is anything well grounded and solid bench-marked in law, it is that you can't enjoin a fellow from doing something that he isn't threatening to do. Otherwise, you could get out an injunction against every known criminal in the country and say, "You shall not commit any crime."

In your argument I hope you will make plain just exactly the posture of this case and why an injunction is the proper remedy. Without the proper basis for this, the case might be considered moot. It might be.

Mr. Collett: That is correct. I mentioned that because the plaintiff has served the Postmaster of San Francisco personally with this subpoena, and, necessarily, it was referred to me and I wanted to call the attention of the Court to it at this time. Having done so, we will leave it stand, and if there is anything further, Mr. Fixa would be available if it was necessary for him to be called. The subpoena was served and necessarily calls for him to appear before this Court at ten o'clock this morning.

Judge Bone: Do you care to make any further argument [fol. 81] on this problem at this time?

Mr. Collett: Oh, yes, I want to make some argument, if the Court please.

As a matter of some convenience to the Court, it may be of interest and also provide some little reading matter here at some considerable length—This is the report of the hearing of the committee of the Post Office and Civil Service of the United States Senate on HR 7927, which has been identified by the plaintiff as HR 7929. I have a copy for each of you here. It contains all the matters that have been referred to by counsel.

Judge Bone: Are these statutes or regulations?

Mr. Collett: No, simply as a matter of the convenience of the Court, this is the hearing before the committee on the statute which is involved here. In other words, you have to look this up in the legislative history, and this is a copy of it all prepared in complete form.

Judge Bone: Can you call our attention to any particular place in this? This is a big record.

Mr. Collett: That is true, Your Honor. That is true. It is just as a matter of convenience. Mr. Krause refers to some portions of that in the memorandum which he filed on December 24th, and I am just giving it to you as a matter of convenience that that is the record, and it also serves his convenience, too. The entire committee hearing is there.

[fol. 82] Mr. Krause: May I approach the bench, Your Honors? I just wanted to say that I haven't seen the report of the hearing in that particular form, and I assume Mr. Collett is giving you the full hearing. He hasn't given me a copy of that particular document, and I would, of course, want to reserve the right to question whether he is giving you the full hearing. I just don't know what document he has given you. I have nothing I can say at this time other than that—unless Mr. Collett would feel able to give me a copy of it, which would be very convenient, I believe.

Mr. Collett: I don't have another copy to give to him. There is another copy that is not in my possession immediately which I will be glad to afford counsel an opportunity to look at, and I think any references he has to make with regard to what is in there, he will find that they are in there. If there is any objection noted to it, why,—

Judge Zirpoli: He will be privileged to examine mine, if he desires.

Judge Wollenberg: Yes, I was going to offer you mine, Mr. Krause. Just pick it up any time. It is in my chambers.

Mr. Krause: Thank you.

ARGUMENT ON BEHALF OF DEFENDANTS BY MR. COLLETT

Mr. Collett: The statute which is involved, if the Court please, is Section 4008 of Title 39. Assuming Your Honors have already read it, I would like to refer to it specifically and particularly to certain portions of it which I [fol. 83] think are pertinent. The statute says that:

“Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a for-

eign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be 'communist political propaganda,' shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed 60 days, the matter detained shall be disposed of as the Postmaster General directs."

That is the statute which is the subject of the particular controversy which is now before this Court on the motion to dismiss.

On the complaint which was filed, which is in the record, it is entitled an "Action for Injunctive and [fol. 84] Declaratory Relief — Three-Judge Court Requested."

The first paragraph says:

"That this is a suit for declaratory relief and to enjoin the enforcement of 39 U.S.C. 4008 (Public Law 87-793) regulating the mailing of 'communist political propaganda.' Said statute is set out as 'Exhibit A' attached hereto. This Court has jurisdiction over the subject matter thereof and the defendants herein." and so on, referring to Section 2 of the Constitution and the First and Fifth Amendments.

Paragraph II says:

"There now exists an actual justiciable controversy between plaintiff, who is a resident of this judicial district, and defendants concerning the receipt and mailing of 'communist political propaganda.' Plaintiff, as further described below, will suffer immediate

and irreparable injury if the relief prayed for is not granted."

Paragraph III says:

"The defendants, and each of them, in their captioned official capacities are charged with the enforcement of the provisions of 39 U.S.C. Section 4008 by the terms of the statute itself, or, as to Defendants Fixa and Brokaw, by the orders, regulations and instructions of their superiors, and have enforced and [fol. 85] threatened to continue to enforce said law in the manner hereinafter described, even though, for the reasons hereinafter described, said law is void and unconstitutional."

Paragraph IV says:

"On or about July 12, 1963 plaintiff Leif Heilberg received a letter through the United States mail from the defendant Fixa on a card marked POD Form 2153-X containing the following message:

'Message to Addressee

'This office is holding unsealed mail matter addressed to you from a foreign country. Under Public Law 87-793, the Secretary of the Treasury has determined this mail to be communist political propaganda. It cannot be delivered to you unless you have subscribed to it or otherwise want it.

Please check the appropriate spaces under "Instructions" on this card and return the card.'"

And the instructions were to deliver it or not to deliver this publication and similar publications. In other words there was a place for him to check whether he wanted it.

In Paragraph V the complaint alleges that:

• "Plaintiff Heilberg did not order said detained matter; however, he desires to receive this piece of mail and all mail addressed to him in the regular [fol. 86] course of the post without said mail being delayed, labeled, read, screened, passed, detained, de-

stroyed or otherwise processed pursuant to the terms of 39 USC Section 4008."

Now again, Section 4008 expressly provides that the man "shall be notified that such mail has been received and will be surrendered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee."

On the basis of the allegations in the complaint that the plaintiff desired to receive this particular matter, when the matter came on for hearing before Judge Burke, I had in my possession the particular piece of mail which is involved. I ascertained the identity of the plaintiff, who readily, through his counsel and himself, stood up, and I personally handed the particular piece of mail which is involved to him. He received it into his possession, but I note that counsel now in his memorandum which was filed has made certain statements which indicate that something other than that happened.

The order of Judge Burke in denying the temporary restraining order recites:

"On July 30, 1963 Plaintiffs filed an action for [fol. 87] injunctive and declaratory relief predicated upon alleged unconstitutionality of Title 39 U.S.C., Section 4008, regulating the mailing of 'communist political propaganda.' Plaintiffs' prayer included a request for a temporary restraining order restraining defendants from destroying or disposing of certain written matter entitled 'A Proposal Concerning the General Line of the International Communist Movement' allegedly in the physical possession of the defendant John F. Fixa. On July 31, 1963 plaintiffs filed a motion for order granting preliminary injunction and obtained an order shortening time for notice of hearing on said motion on Friday, August 2, 1963. Although described as a motion for an order granting a preliminary injunction, it was considered by this Court as a motion for a temporary restraining order pursuant to Title 28, Section 2284, U.S.C., Paragraph 3, to prevent irreparable damage.

"At the hearing on August 2, 1963 the defendant John F. Fixa, through counsel, gave an unconditional release of physical possession and all claim to the material described in the motion filed on July 31, 1963. Upon representation of government counsel that the material tendered constituted all mail matter described in the above complaint and in the possession of any of the defendants named, plaintiffs conceded the absence of any evidence to the contrary. Therefore, it appearing to the Court that subject matter to which a [fol. 88] temporary restraining order could be directed is neither in jeopardy of destruction or other disposition as alleged in plaintiffs' motion and is in fact immediately available to plaintiffs, the motion for order granting preliminary (temporary) injunction is denied."

The plaintiff in its memorandum has added a paragraph here with regard to constructive possession, and I seem constrained to make some comment about it.

What he did with the letter after receiving it, I haven't any idea, but he makes the statement on page 1 of his memorandum:

"As the affidavit of Assistant United States Attorney Charles Collett will show, a purported transfer of said mail took place in 'open court' on August 2, 1963, in the courtroom of Judge Burke. Plaintiff in fact refused to accept the mail under such conditions and it was abandoned by the United States Attorney in the courtroom."

Then he goes on to say: "No legal delivery took place under such circumstances and the defendants can be held to a constructive possession of said mail," Now, that statement, I think, belies the order of Judge Burke. I think that the matter was entirely before the Judge and no attempt was made to present anything other than as is indicated in the opinion by the judge, which was conceded [fol. 89] by the plaintiff at the time, was on the basis that whatever the subject matter that was before us, it was delivered to the plaintiff in open court in accordance with

the desire which he expressed in his complaint and in accordance with the provision "as otherwise determined by the Postmaster to be desired" by the plaintiff or the claimant. The complaint goes on—to again refer to the complaint—in Paragraph VIII it says:

"Unless restrained by this Court, the defendants will destroy the copy of 'A Proposal Concerning The General Line of the International Communist Movement' if a reply to POD Form 2153-X is not received by August 2, 1963. Unless enjoined to do so by this Court, defendants will not deliver said literature to plaintiff unless he requests delivery and complies with the requirements of 39 U.S.C., Section 4008."

The allegation of that paragraph is completely negated by the facts of what occurred. The matter that was involved was delivered to him and there was nothing that the Court actually could restrain in the way of destruction of any mail matter that was the basis for the filing of the complaint.

The question of the unconstitutionality of the statute is one, of course, of considerable seriousness, and I think that I might at this time refer to the Supreme Court decision which is the basic premise on what I think I might consider, and the case was cited by the plaintiff in his [fol. 90] memorandum, and I think it kind of gives a guide line as to what is to be determined in this sort of thing. It is the case of *Massachusetts v. Mellon*, 262 U.S. It is found at page 447, but I would like to quote from page 488 in which Justice Sutherland states:

"The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may direct, control or restrain the action of the other. We are not now speaking of the mere ministerial duties of officials—" citing *Gaines v. Thompson*. "We have no power per se to

review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way [fol. 91] of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess."

I particularly like this particular point: "Looking through forms of words to the substance of their complaint," which I think is essentially where we are here right now, looking through the form of words. And I might say the memorandum which was filed by the plaintiff I might characterize as something like a Whitman [fol. 92] Sample box. He quotes from many, many cases that have been in the Supreme Court on all sorts of things from pornographic literature to matters involving civil rights, and so on. We can go on endlessly with the extent to which we can cite opinions of the Supreme Court in five to four decisions.

With regard to the matters pertaining to the communist

matters, I think the Court is probably well aware of the Internal Security Act, the Immigration and Nationality Act, the extent to which matters pertaining to deportation have invoked the Supreme Court's attention, and this is going back to *Rowoldt v. Perfetto* and *Harasaides* cases, one of which I brought down with me which indicates the extent to which one might cite innumerable other opinions, but this is the *Communist Party of United States of America v. The Subversive Activities Control Board*, 267 U.S. 1, which is a good example of the extent to which we have become involved in the rules relating to the problem which seem to have become so very difficult with regard to the activities of the Communist Party or the extent to which civil liberties and so on are currently involved.

Purportedly you have something here which is related to the Constitutional guarantee of freedom of speech and the First Amendment and the Fifth Amendment.

To come back again to this complaint and the form of words in which he has put his claim by which he seeks to obtain relief in this court, I mentioned Paragraph V in [fol. 93] which he said he desires to receive this piece of mail which would have been the subject matter or the res upon which this Court might exercise its power to enjoin the defendants. But that was delivered to him so there is no longer anything that this Court needs to enjoin the defendants with regard to that subject matter.

The plaintiff goes on and says:

"Plaintiff is informed and believes and on this basis—" And this is in Paragraph VI—"alleges, that one or more of the defendants maintains a list or card file of those persons who signify a willingness to have delivered to them 'communist political propaganda' and that if plaintiff signifies a willingness to accept the material described in Paragraph IV above, or similar publications, that his name will be added to said list. Plaintiff does not wish to have his name on any list of persons signifying a willingness to accept 'communist political propaganda' because the presence of his name on such a list will unfavorably and unfairly stigmatize him as a person who desires to have Communist propaganda sent to him and there-

fore might be in the category of persons considered disloyal to the United States of America, 'soft on Communism,' weak-minded, and other derogatory categories all to his embarrassment and damage to his [fol. 94] reputation and ability to earn a livelihood."

That is essentially the sum and substance of what is now before this Court. However, this is all conclusion as far as the pleader is concerned, that it will unfavorably and unfairly stigmatize him. What actually is involved is that Congress has passed an act here which is related to communist propaganda. It is in line with the congressional authority with regard to the mail, which I have in the memorandum filed indicated that that is a proper power of Congress.

And we also can well be apprised of the presence of receipts of large quantities of material which can be characterized as propaganda in this country might be well the subject of some consideration by Congress in order to maintain some control over them. But in any event, the Congress of the United States enacted with regard to "mail matter, except sealed letters, which originate or is printed or otherwise prepared in foreign countries and which is determined by the Secretary, pursuant to rules and regulations to be promulgated by him to be communist political propaganda shall be detained by the Postmaster upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mail, and the addressee shall be notified that such matter has been received and will be delivered only on his request, or is otherwise ascertained by the Postmaster to be desired by the addressee."

There is nothing said about any kind of a list in that [fol. 95] statute. The matter that is alleged in Paragraph VI on information and belief is not related to any portion of the statute which Congress has prescribed: that a list shall be made of all these individuals that shall be kept and shall constitute something of the nature of the charge that the plaintiff has set forth here. I say that the matter contained in that paragraph VI is purely a figment of the plaintiff's imagination and constitutes nothing.

ing more than conjecture, conclusion, not even a suggestion of a fact.

Judge Zirpoli: May I ask a question, Mr. Collett?

Mr. Collett: Yes.

Judge Zirpoli: How can the Postmaster carry out the mechanics of the act without a list?

Mr. Collett: Without a list?

Judge Zirpoli: How can he carry out the mechanics of it?

Mr. Collett: It would seem necessarily if an individual desires to receive it that some sort of a file would necessarily have to be maintained to refer to. In other words, if we consider the orderly procedure and orderly manner in which to execute the mandate of Congress—

Judge Zirpoli: I am not necessarily saying that it is wrong to keep a list; I am just inquiring how you can do it without a list.

Mr. Collett: I am saying necessarily, in order to manage, you would have to maintain a file of some kind or other—

[fol. 96] Judge Bone: I don't want to be confused by the word "list." In short, what it means, he writes a letter—

Mr. Collett: A card is sent out as set forth in the complaint.

Judge Bone: They come into offices by the thousands.

Mr. Collett: That is right.

Judge Bone: Maybe the Postmaster has a box where he puts those things so in case some question is raised he can say, "This fellow's mail is to be delivered to him at his request."

Mr. Collett: That's right, or it is desired by him.

Judge Bone: Or desired, and those expressions appear throughout the arguments and in these pleadings.

Mr. Collett: That's right. In other words, necessarily in order to proceed in an orderly manner as we would have to assume—

Judge Bone: Well, what we must assume—I assume myself, maybe, a bit—but it is perfectly lawful for him to receive communist literature in the form covered if he merely indicates that he wants to get it.

Mr. Collett: That is right.

Judge Bone: He is not charged with a crime merely because he got it.

Mr. Collett: Nothing whatsoever. There is no crime of any kind charged; it is simply to facilitate the disposition [fol. 97] of what undoubtedly must be a tremendous amount of material. I don't know the extent to which this mail matter comes in, but it is a matter of controlling the mail which is taking advantage of not the regular sealed mail rate but it is an open mail envelope. There is a tremendous amount of that material coming in, and of course it means that if it is going to be permitted to be handled regularly without some attempt made to separate it from all of the responsibilities of the mail service, and Congress has enacted a statute that indicates that in the case of communist propaganda the Postmaster General shall do certain things and Congress has said that it shall be delivered to the addressee. There is no restriction upon it if the individual desires it.

Judge Zirpoli: Could I ask you another question, Mr. Collett? Is there anything in the legislative history that is intended to protect John Smith who doesn't want to receive communist literature?

Mr. Collett: All he has to do is to say that he doesn't want it.

Judge Zirpoli: He doesn't have to say anything if he doesn't want to, but what I am driving at: Is there anything in the legislative history to show that this act is intended to protect John Smith who doesn't want it delivered to his apartment or to his home where everybody can see that he is receiving communist literature, and [fol. 98] therefore it will be delivered to him? Is there anything in the Act of that nature?

Mr. Collett: If the Court please, this volume came by mail the day before Christmas along with the plaintiff's memorandum. I have plowed through some of it but I can't answer Your Honor's question. There are innumerable reports and statements made therein, and it seems that Congress did have in mind any number of these considerations, but to point to where it is specifically so stated—You can quite readily see that they are looking at it from another direction, that is, looking out another window. In this instance we have an individual who de-

sires to receive it, but he is here saying that because he says he wants it he is going to be stigmatized somehow or other, but the question asked by Your Honor I think could be very properly raised.

Judge Bone: Mr. Collett, I intended to ask you the same question. Is there anywhere in the history of the Post Office Department where a man has been harmed by this kind of business?

Mr. Collett: I know of none.

Judge Bone: This case is unique, *sui generis*; it comes here with no background of information. Neither side produced witnesses. Sometimes I wonder why they impaneled these three-judge courts, with not a scintilla of evidence or witnesses of any kind to give the court any information. We are the last people on earth, apparently, who [fol. 99] get the information. This is a nice way to try a lawsuit in an American court.

Mr. Collett: If the Court please, on the question of a three-judge court being impaneled, I did call to the attention of the court below the Martinez-Mendoza case.

Judge Bone: I know, but they want to put the burden upon us of ordering these men to come up and testify!

Mr. Collett: The thing is when a matter is—

Judge Bone: We can do it if we have to, but why put that burden on the court?

Mr. Collett: What I was going to say is that the Martinez-Mendoza case—perhaps Your Honor may recall it and the other expatriation cases of which we have had a number in this court—the one involving an individual departing from and remaining out of the United States to avoid military service. It was down in Fresno and was heard by a single judge and the question was whether or not because it involved constitutionality it should have been heard before a three-judge court. And of course the whole problem of whether a three-judge court is convened in a particular case seemed to me to be rather carefully and specifically indicated in that case. The idea is that a single judge should not have the power to declare an act of Congress unconstitutional.

Judge Bone: Yes, I was quite familiar with all of that before I became a member of Congress myself. They didn't want one judge upsetting a state or a federal statute, so

[fol. 100] these three-judge courts were set up as expediting courts.

Mr. Collett: It says:

"Whether an action solely for declaratory relief would under all circumstances be inappropriate for consideration by a three-judge court we need not now decide, for it is clear that in the present case the congressional policy underlying the statute was not frustrated by trial before a single judge. The legislative history of Section 2282 and of its complement, Section 2281, requiring three judges to hear injunctive suits directed against federal and state legislation, respectively, indicates that these sections were enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order. Section 2281 was a means of protecting the increasing body of state legislation regulating economic enterprise from invalidation by a conventional suit in equity."

The whole impact of the three-judge court is the injunction. The statute is being enjoined and the enforcement of the statute is being enjoined; in other words, going from the legislative to the executive to the judiciary, we are enjoining the executive department from enforcing a proceeding to implement by execution the act of Congress on the contention that it is unconstitutional; and that is what calls for the convening of a three-judge court.

Again in this case, as I pointed out, the first statement says that this is a suit for declaratory relief and to enjoin the enforcement of 39 U.S.C. Section 4008, but the paragraphs I have already read more specifically related to this piece of mail, and that piece of mail was delivered to the plaintiff, into his possession, on his desire in accordance with the statute—his expressed desire. He expressed in his complaint that he desired to receive it. It was delivered to him. Therefore, at that particular point what is there to be enjoined that would call for the invocation of a three-judge court? The injunction was denied.

Judge Bone: I don't think he probably would deny that.

If he does, we will produce him in court and put him under oath. But his complaint seems to be that the local Postmaster maintains some kind of a record or list, or whatever you want to call it, of names. That is the real guts and heart of this case.

Mr. Collett: That seems, cutting through the words, to be the gist of the case.

Judge Bone: Now, concededly the man has asked for the mail. He has requested it.

Mr. Collett: He desires to receive it.

Judge Bone: He desires to receive it. Well, what is [fol. 102] the difference between that and requesting it? I am not going to bandy words. We are not here to get into the realm of semantics. He requests or desires; what's the difference?

Mr. Collett: That's right. But he goes on in Paragraph VI and he builds up what I would say is something in the nature of a bogey man: "That plaintiff does not wish to have his name on any list of persons signifying a willingness to accept communist political propaganda because—" "Because," he says, "the presence of his name on such a list will unfavorably and unfairly stigmatize him as a person who desires to have communist propaganda sent to him—"

Judge Bone: That is his assumption. He avers it on information which he says he believes, and he doesn't produce anybody who told him that. Let's produce that fellow, the red squirrel who ran under the barn. Why come into court with half a disclosure of these things? If your opponent has some evidence, let him produce it. I would like to quiz this fellow who told him there was a list in the post office, and find out how much he knows. Or do they want to conceal that? Do you want to conceal it? Does anybody want to conceal it? Let's have no concealment in this case. You have got the lid off now and let's look down into the case and see what's in it, at least so far as I am concerned. Bear in mind, Mr. Collett, I am not speaking for my two associates. They are kindly gentlemen and they may not share my vigorous views about [fol. 103] prying into these things. Maybe it is a hang-over from days in the D.A.'s office where I want to get at facts, and trying criminal cases for years. I don't want

anything concealed. We are here now and let's have the lid off.

Judge Wollenberg: Your two associates have had the same experience.

Judge Bone: Here I have two gentlemen with me—I should shudder when I think of it—who lived around the D.A.'s office. They didn't call them D.A.'s up in my country but they performed the same functions. They enforce the law here in a slightly different way in California than they do in the state of Washington.

But what is the purpose in trying a case here where averments of fact in a vague sort of way are put before the Court and no testimony of any witness or no substantial documentary evidence of any kind is produced?

You may wrestle with that.

Judge Wollenberg: May I point out that before Mr. Collett took up the list, just at the start of the hearing he stated that some subpoenas have been issued, so probably somebody intends to produce some evidence or did intend to.

Mr. Collett: I mentioned that Mr. Krause did serve the Postmaster, Mr. Fixa, personally with a subpoena which was directed to—

Judge Zirpoli: Assuming all these things to be true, [fol. 104] and assuming that this Court would go so far as to say the act was unconstitutional, what would the Court have to do to implement it?

Mr. Collett: Well, that is a very interesting question.

Judge Zirpoli: What would the Court have to do?

Judge Wollenberg: That is what is bothering me.

Mr. Collett: I don't know, Your Honor. I don't know what you can do. As far as I can see, this is a matter that would be essentially a declaration that the act is unconstitutional—just a declaration.

Judge Bone: I am sure that would entertain Congress to find three federal judges out here saying an act of theirs was unconstitutional. I don't think they would particularly care for that kind of a declaration and we would want to be on mighty solid ground in pronouncing it.

Mr. Collett: That's right.

Judge Zirpoli: Is it your contention that ultimately all we can do is to issue an injunction, and there is no need

for an injunction in this case, and therefore there really is no controversy?

Mr. Collett: That is about what I find to be the case: that there has got to be something specific here with regard to this individual and there isn't anything. What they are seeking to get is a general type of determination as related to the entire population that this statute is unconstitutional, period. There is no res before this Court; there is no subject matter; there is nothing upon which you are going to proceed. There is nothing in the statute with regard to any kind of a list. If we had regulations promulgated which required certain things and he attacked those as being unconstitutional, as was done in the waterfront case, *Parker v. Lester*, for instance, regulations promulgated by the Coast Guard in which you attack them as being unconstitutional because they don't do this or do that or the next thing. But there is not that in here. There is nothing in the complaint which concerns any averment to that effect. In fact, there is nothing in the statute that calls for anybody to make any kind of a list. But as Your Honor Judge Zirpoli pointed out, which I would concede, that necessarily proceeding in an orderly manner to execute the responsibilities imposed by Congress upon you, necessarily if you seek to find out who wants to get this stuff and "A" says, "Yes," and "B" says "No," then you just don't throw it into the waste basket. There might be two or three, there might be an entire pattern of this sort of thing, and there may be individuals, as Your Honor pointed out, who would have no part of it, and would write back and say, "Why do you ask me about this? I don't want any part of it. I would like you to know very definitely that I will have no part of this communist propaganda." As we well know, in the last several years the extent to which any kind of affiliation [fol. 106] supposedly, we might say, with regard to communist activities, and so on, is injected into political matters, and so on. I suppose that that constitutes essentially the basis of what he is trying to indicate here by some sort of inference.

Judge Zirpoli: Is there also any indication of the volume of mail which became a burden on the mails so that if they

were discouraged to send propaganda here, some of the burdens upon the mail would be relieved?

Mr. Collett: There is some discussion in the committee hearings with regard to that phase of it, and I must say that I am sorry that I haven't been able to get through that entire document to be able to point out specifically to the Court what is in it. There was such a volume of reading matter coming in, particularly over the holiday season, I haven't been able to do that.

But I believe the question is well directed, and I think we would have to, for the purposes of my argument, presume that Congress in its endeavor to perform its functions has taken into consideration the volume that is indicated in that particular document, and it indicates also that they have given very extensive consideration to the matter of this particular statute.

The plaintiff in his memorandum indicates that in 1961 a previous statute was discontinued. I am not particularly advised on that matter.

[fol. 107] Judge Bone: Mr. Collett, would you concede, or is it your idea that the unconstitutional aspect of the statute that is claimed here is due to the fact that such a list as he suggests has been created? What else does the unconstitutionality of the Act relate to? What does that argument relate to?

Mr. Collett: With regard to the list?

Judge Bone: Yes. Is that what he claims makes the Act unconstitutional?

Mr. Collett: That, as far as I can see, is the only thing that is left in this case.

Judge Bone: This is the thing that intrigued me from the very beginning. I want to know why an act of Congress is unconstitutional because of this "list" argument, and that rests on a man's statement that he has heard or been informed that there is a list, and therefore he avers it to be true. I think that there isn't a line of evidence anywhere to prove that it is true. I don't know whether there is a list or not.

Mr. Collett: Supposing, as we do on a motion to dismiss, admit that the Postmaster necessarily, in performing his functions, you will have to presume that he has a filing system—

Judge Bone: I suppose if he got a letter, he wouldn't want to throw it away because he might think, "This fellow will write again and maybe I had better put the letter in a drawer or box or somewhere where I keep that kind [fol. 108] of mail." If there is a formal list—I don't know whether his contention is that there is a card index or that the letters are all filed alphabetically, or what. I would like to know. I don't like to have counsel come in court and aver something on some sort of information. I want to know about the informant, and I intend to learn, if there is any way of doing it in this case. I hope my associates don't impeach me in the meantime for asking this, but I assure you, sir, I am going to find out before we are through with this who this informant is. Bring him up here and let him talk.

Mr. Collett: Might I refer again—

Judge Bone: If counsel don't like that, that's too bad. That's what's going to happen, I can tell Mr. Krause that.

Mr. Krause: Judge Bone, we are prepared to present evidence; we are prepared to present—

Judge Bone: Well, why didn't you do it before? Why precipitate this hearing when you might have settled it in a lower court and perhaps gone up through the Circuit Court of Appeals instead of invoking a three-judge court to hear this case? That is the way the law is, I'll admit. I am not criticizing it, but I am simply saying you could have short-cut this thing. But here we have gone to the trouble here, if you can call it that, of invoking a three-judge court to challenge the constitutionality of an Act that rests on the assumption that somebody informed this fellow something.

[fol. 109] Judge Zirpoli: It just occurred to me—

Judge Bone: I don't know what Congress would do with that. If you think you are aiding free speech, you are making a mistake. We are told by the most prominent men in the country, including the Whitehouse himself and the members of Congress, that the international communist conspiracy is the most dreadful threat against the perpetuity of this republic. Do you expect people to sit around and not even think about it, particularly Congress? If you do, you are making a sad mistake. I, having served

in that body, know its reactions. Why do you think they passed all these laws? Just to be doing something?

Now, are we to believe Mr. Kennedy and Mr. Johnson in the Whitehouse, that this is the most deadly threat ever aimed at this country and the world trembles on the eve of something rather drastic, or are they lying? I don't like those things being bandied around in a court with no substance. Let's produce the substance.

Maybe I had better give you gentlemen a chance to think this thing over and decide who will produce somebody who will give us some information. We have the authority to take testimony.

Mr. Collett: For a moment, Your Honor, keep this in mind—a few more things with regard to this complaint.

I have mentioned "as hereinafter set forth" in a [fol. 110] couple of these paragraphs, and on page 6 is the "Allegations of unconstitutionality by both plaintiffs." Mr. Krause had a cause of action in here also which was dismissed by the lower court. Mr. Krause alleged that he had in his possession a certain magazine entitled, and so on, which was mailed to him, and he was informed and believes and alleges that the defendants in this action have determined pursuant to authority granted them under the same statute that each and every issue of the Peking Review is "communist political propaganda."

He goes on to state that he desires to deposit unsealed in the United States mail his copy of the Peking Review and the New York Times—Western Edition. He desires to deposit said mail unsealed because the postage fee required for unsealed mail containing newspapers or periodicals is substantially less than the postage fee required for sealed mail. "Plaintiff wishes to address the copies of said publications to a friend residing in the United States who has not indicated a desire for said publications, does not subscribe—" and so on. That was dismissed.

Then in the complaint in a separate section he says that the allegations of unconstitutionality by both plaintiffs are—This is Paragraph XVI:

"39 U.S.C., Section 4008 is unconstitutional and void on its face and said fact should be declared by

the judgment of this Court and the defendants herein [fol. 111] perpetually enjoined from enforcing its provisions."

Now, again we have that generality. This isn't anything specific, but that the defendants be perpetually enjoined from enforcing the provisions of Section 4008 "for the following reasons:

"1. It violates plaintiffs' rights to freedom of speech, press, association and privacy as protected by the First Amendment to the Constitution of the United States.

"2. It deprives plaintiff Lell Heilberg of due process of law under the Fifth Amendment to the Constitution of the United States because the exemption of officials of the United States Government agencies, public libraries, colleges, universities, graduate schools, scientific or professional institutions for advanced studies, is an arbitrary classification discriminating against him and categorizing him into a group assumed to be less able to distinguish propaganda than other persons similarly situated as to ability, education and political understanding.

"3. It violates the due process clause of the Fifth Amendment to the Constitution of the United States because the standards for the determination of what is 'communist political propaganda' are vague, uncertain, and do not provide the opportunity for [fol. 112] notice or hearing."

Then he says:

"Plaintiffs have no adequate remedy at law to protect them from the effects of said defendants enforcing 39 U.S.C., Section 4008——"

I state, with due regard and respecting Your Honors' comments, that this complaint, as I pointed out in one of the decisions with which the Court is familiar—that you don't invoke a three-judge court just on an idle proposition; that if you are taking the time of three judges to come in here and spend the time and do a great amount of

work, it is a matter which is serious, in an endeavor to perform their function, which I have indicated from a statement in *Massachusetts v. Mellon*, that this Court is asked to set aside or declare unconstitutional an act of the legislative body and that it should not be done upon an idle or inconsequential matter. And I think a reading of this complaint as well as a statement of the words of what is involved here, that this is not a matter which a serious-minded individual really seeking to attack the constitutionality of an act of Congress of the United States would seriously present before a three-judge court; that this is jousting with something—I don't know how to otherwise characterize it; it is a little bit out of character perhaps, pertaining to something that would be a more personal kind of remark, but to my mind, you must take seriously the position of the Government of the United States in the performance of its functions and its respective departments that it calls for the pure-minded people to present problems that are substantial in nature to a court in order for it to make a proper determination; and I don't think that there is anything before this Court acting upon which to go forward and endeavor to have a trial and to again call for the attention of this Court to give all of the research and so on to the extent to which I indicated counsel can recite the opinions of the Supreme Court would take an enormous amount of time to read and understand. But we have nothing here. The material that he has said he wanted, he has already got it, period, and will continue to get it from here on, and on that ground I think that the motion to dismiss should be granted.

Judge Bone: Perhaps we had better have a five-minute recess before we hear from counsel on the other side.

(Recess.)

ARGUMENT ON BEHALF OF PLAINTIFF BY MR. KRAUSE

Mr. Krause: Your Honors, I am Michael Krause, one of the attorneys for Mr. Heilberg. I am not going to answer Mr. Collett's argument at this time except to say that a three-judge court is necessary for—

Judge Zirpoli: May I ask you a question at the outset?

Mr. Krause: Yes.

Judge Zirpoli: I notice in affidavits that are on file here that there are presumably cases pending in other [fol. 114] districts.

Mr. Krause: Yes, Your Honor.

Judge Zirpoli: Instituted by the American Civil Liberties Union?

Mr. Krause: No, Your Honor. One of them was as counsel the Southern California Counsel for the American Civil Liberties Union.

Judge Zirpoli: What about that New York case?

Mr. Krause: In the New York case counsel does not have any connection with the American Civil Liberties Union as far as I can determine.

Judge Zirpoli: Were those cases filed before this case?

Mr. Krause: One of them was and one was not.

Judge Zirpoli: Don't you think the decision there would have been sufficiently determinative without the necessity of invoking another three-judge court, considering the backlog of cases that we have in the courts? Isn't the very nature of this case such—

Mr. Krause: I am quite conscious of the use of judicial manpower.

Judge Zirpoli: Here we are using nine judges to decide this question, presumably, instead of three.

Mr. Krause: No, Your Honor. Let me say this, Your Honor. This isn't in these affidavits, but as a matter of [fol. 115] fact, I know in these other two cases that a three-judge court has not been convened. This is the case that is further advanced. The other cases have been quite delayed by procedural matters and in no other case has a three-judge court been convened. It may be that those other cases will be adjourned pending this case, which would be the logical thing, since this is the furthest advanced. But my client is in this district and also has a right to have his case determined regardless of any other cases, Your Honor. But this is the furthest advanced case and this is the one which I think presents the issue in the clearest terms. I have examined the pleadings in the other two cases and I am not satisfied with those pleadings. I am satisfied with my pleadings, not with some other lawyer's pleadings. I don't want my case determined on some

other lawyer's pleadings. That is the best of my ability, Your Honor, to answer you.

Judge Zirpoli: Proceed.

Mr. Krause: No district court could consider the complaint without a three-judge court once it has been determined that a substantial constitutional issue is presented, which it has been determined.

The Government is controverting the allegations of our complaint, which takes us into the realm of summary judgment, as I understand Federal Rule 12(b). Therefore, we want to present testimony to controvert some of those [fol. 116] affidavits and to establish facts as alleged in our complaint for the purpose of resisting this motion to dismiss on the basis of mootness, and first we would like to call Mr. John Fixa who has been served with a subpoena.

Judge Zirpoli: Would you care to indicate to the Court what your offer of proof is?

Mr. Krause: Yes. Our offer of proof by Mr. Fixa is that there is a list of persons who have signified willingness or desire to receive communist political propaganda. This list is kept pursuant to the necessary implications of Section 4008 which we are attacking in this case.

Judge Zirpoli: May I inquire further, assume for a moment that there is a list, and assuming that there is a list, why shouldn't the Court still dismiss this complaint? What benefit are you going to get by any conceivable injunctive relief that this Court can give you?

Mr. Krause: Let me say that the list is merely one small aspect of this case. It is important to my client, Mr. Heilberg, that his name not be on the list. His complaint said that he didn't want his name on the list, and the Government then has what I consider the gall to consider this complaint a desire to be put on the list when his complaint says that he doesn't want to be put on the list.

Judge Zirpoli: May I ask, what is the benefit that your client is going to get from any possible injunctive relief [fol. 117] that we may give?

Judge Wollenberg: In other words, what is the nature of the injunctive relief that you are seeking from us?

Mr. Krause: All right. In the first place, this Court could enjoin these defendants from putting Mr. Heilberg's

name on a list and causing him the disadvantages which we alleged in our complaint and which for the purposes of this motion must be considered as true. That is the first thing that could happen.

Secondly, the operation of this statute as applied to Mr. Heilberg could be enjoined for these reasons: Number one, it delays the receipt of his mail; number two, it is—and we are prepared to prove that, Judge Wollenberg, that the operation of this statute delays the receipt of his mail and also operates as a search of his mail, both of which are personal rights in property which Mr. Heilberg has a right to protect.

Thirdly, the injunction of this Court could enjoin the operation of this statute as a censorship provision violating the First Amendment.

We say that the Government of the United States operates under delegated powers as given in the Constitution. Nowhere in the Constitution—and I include the right to run a post office—is the Government given the power to label mail and tell the citizens of the United States what is and what is not propaganda. This is a judgment for the citizen to make.

[fol. 118] When the Government makes that judgment and tells a citizen or all citizens, this is an illegal operation of the government which the courts are empowered to stop. It hurts my plaintiff and it hurts all citizens who are similarly situated.

Unfortunately, I don't believe there is an ascertainable class here or else this could have been a very good class action. But the group that receives mail from foreign countries I don't believe is a sufficiently definite class, and therefore this is not a class action.

But as we have shown in the civil rights cases, the courts have given injunctive relief on the behest of one plaintiff to benefit an entire class because the entire class' rights are involved here. This is just a summary of what the court—

Judge Zirpoli: Isn't this more theoretical than it is real?

Mr. Krause: No. I think it is very real. I think the Government has attempted to disguise this case when a man files a complaint by going ahead and not applying the statute and giving him his mail and saying, "Well,

you are a special person; you paid \$15.00 in the U.S. District Court and you filed a complaint; therefore we will give you your mail." This is not something the Government should do.

If the statute is valid and legal, they should be [fol. 119] willing to face the test and not attempt something like this.

But we are prepared to prove, number one, that there was no real delivery of this mail; that it was delivered to Mr. Heilberg under such conditions as to belie any request or desire by him for delivery under these conditions.

Judge Zirpoli: This is all past action. What we are concerned about is what we can do or should do in the future. Where in this thing are you going to achieve anything by injunction of this court?

Mr. Krause: Yes.

Judge Bone: Are you asserting to us that he won't get this mail if you don't secure an injunction? Are you willing to go that far?

Mr. Krause: The United States Post Office—

Judge Bone: I know, but answer that question. I don't want to press you too much, but is it your contention—are you now contending to us that this man won't receive this mail from now on?

Mr. Krause: No. I ask for the right to pursue what I am—

Judge Bone: We are applying injunctive relief retroactively. What is before us? The man is getting his mail. How is he going to be injured in the future any more than he is being injured now?

Mr. Krause: I will be glad to answer that, Judge Bone. [fol. 120] We are prepared to prove that Mr. Heilberg continues to get mail from countries behind the Iron Curtain, as a matter of fact, has a voluminous correspondence all over the world; that his mail continues to be processed, opened, searched, labeled and delivered to him.

Judge Bone: How do you know that?

Mr. Krause: Well, we will prove it to your satisfaction. We are prepared to do that. We are prepared to show these facts.

We are prepared to show that this is not the kind of delivery that would moot this case by any means. It is

almost the same as if the Government said, "Mr. Krause, you are getting first-class mail. We will open it, we will read it, and we will make a list of the correspondents to you, and this information will be available to whomever wants to see it, but then we will deliver your mail a few days later. You don't object to that, do you, Mr. Krause?" I would say, "By God, I do object to it. I object to it in the most strenuous terms." And I think Mr. Heilberg has the right to say the same thing, even though this is not first-class mail, but some other kind of mail sent at less postage rates. I think there is a continuing controversy because he is receiving his mail under unconstitutional conditions. The mere receipt—

Judge Bone: What is this unconstitutional condition that you say presently exists? What is it? That he has [fol. 121] notified the Postmaster that he wants this mail, that puts him in the class of a suspected criminal?

Mr. Krause: It puts him in a class of a person who desires to receive "communist political propaganda."

Judge Bone: That is beside the point. Is reading communist literature a criminal offense? If it is, I am guilty of a crime. I read a lot of it.

Mr. Krause: It is not a criminal offense, Judge Bone. It is an offense to his right of privacy and it is an offense to his right to be—

Judge Bone: I might be annoyed if someone asked me if I read communist literature. My answer would be, "It is none of your business; I read it. Now, what about it?"

Mr. Krause: "None of your business." That is just the point here that I am making.

Judge Bone: Oh, no. Your man is in court suing. I wouldn't dignify a thing like that by a suit. My friends would regard me as a silly ass if I tried it.

But anyhow, you know once in awhile it is a good idea for the officials of law to keep an eye on people. We have a dead boy who was a friend of mine who was shot to death by a man. Perhaps if they had looked into that fellow a little more carefully, Mr. Kennedy would be alive today. Do you want to have more handcuffs put on inquiries of any kind? If you do, sir, I do not agree with you, and I [fol. 122] think I have as much respect for law as you and your client. And anyhow, can you call our attention to

any case parallel with this that has been decided by the Supreme Court?

Mr. Krause: Yes, Your Honor, but—

Judge Bone: Oh, no; no, let's not find some analogy somewhere. Has there been a case of the kind when 4008 has been under challenge and the Supreme Court has passed upon it clearly?

Mr. Krause: That section has just come into effect in January of 1963.

Judge Bone: I know, but it is easy to get into the Supreme Court. January of last year.

Mr. Krause: There has been no case challenging the constitutionality of 4008.

And I want to say to Your Honors now, I don't usually enter into arguments with judges about their statements if I can possibly avoid it, unless it has something to do with the merits, but I want to say this: that we would resent it most highly if any aspersions were cast on Mr. Heilberg for bringing this suit in connection whatsoever with any political cause or any maniac that happens to be walking the streets. This has nothing to do with Mr. Heilberg's case and we would like to have it proceed and present our evidence if we may. May I call Mr. Fixa?

Judge Bone: Yes, you may call him.

[fol. 123] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Collett: If the Court please, as I announced at the beginning, Mr. Fixa is downstairs. He is available. I felt it wouldn't be necessary for him to be in court here because I didn't consider at this posture of the case we were in a position to take any testimony; that if the Court would rule upon the motion, that it would then be necessary at such time to bring the case into issue; that I expected Mr. Krause would be directing his argument to the motion. He says it has already been determined. It has not been determined. The motion before the lower court was denied without prejudice to renewal before this Court, and it is now still before this Court as to whether or not there is any substantial question to be concluded by this Court on the basis of the complaint that is before it.

Counsel says that the three-judge court has already been

called here. Well, there is a three-judge court, but the issue before the Court is whether or not there is any matter to be presented to this Court that calls for any determination by a three-judge court. I refer to my argument again that I made this morning.

Mr. Krause: Excuse me. Maybe Judge Zirpoli can clear us up on that. It was my understanding that the United States before a single district judge moved to dismiss this case as moot and the motion was denied without prejudice—not without prejudice to again challenging the substantiality of the constitutional issues, but without prejudice as to whether it is moot or not, and I think that was the decision.

Judge Zirpoli: Denied without prejudice as to whether it is moot or not and also as to whether you have a true controversy.

Mr. Krause: Yes, whether there is a cause of action stated.

Judge Zirpoli: There was no doubt in my mind as to the plaintiff Krause that there was no conceivable controversy, and the Court dismissed as to the plaintiff Krause. As to the other plaintiff, the Court denied the motion without prejudice so that it might be presented to a three-judge court, and we are here, at least as I conceive the matter, to pass on the question of mootness and also the question of whether you have a true controversy.

Mr. Krause: Yes, Your Honor.

Judge Zirpoli: And in that connection, as far as I am concerned, I am also here to determine what conceivable basis is there for this court now to indulge in declaratory judgment if the basis for declaratory judgment is injunctive relief and all the benefits that can conceivably be derived by injunctive relief have already been attained by this plaintiff.

Mr. Krause: All right. I agree that those are among the issues that are before this Court now.

[fol. 125] Judge Zirpoli: They are the basic issues. Whether there are many more included, they are basic.

Mr. Krause: But my point is that the issue as to whether there is a substantial constitutional question for which to convene a three-judge court is not before this court, because that has been passed—that question is past.

Judge Zirpoli: That is merely the purpose of convening the court; that doesn't preclude the court from, once being convened, concluding that there is no true controversy.

Mr. Krause: I am in agreement with that, Your Honor.

And may I say that Mr. Fixa was subpoenaed to be in this court at 10:00 a.m. and I don't know of any excuse why Mr. Fixa should not be here right now.

Mr. Collett: May it please the Court, I took the precaution to advise the Court, and his representative is here. Mr. Fixa is an executive officer of the United States and is a busy man.

Judge Zirpoli: I don't know how my colleagues feel. I don't believe there is any need for any excuse on this question. You made your point at the outset of the hearing.

Judge Wollenberg: Did you say you have a representative who is familiar with all of the information or something?

Mr. Collett: His representative is here. I can get Mr. Fixa up here if the Court wants to have him here. What are we calling Mr. Fixa for if we are assuming that Mr. [fol. 126] Fixa has a list?

Judge Bone: As far as I am concerned, I can only assume that Mr. Fixa has a box where he puts these letters.

Mr. Collett: Well, what about the postman, if it is determined that an individual desires to receive the mail?

Judge Bone: Of course, we can't enjoin the postman on his route very well. He hasn't asked for that. Maybe we ought to bring the postman with him because he is familiar with the fact that this literature is being distributed to this man. Do you want the postman on his route to be enjoined, Mr. Krause?

Mr. Krause: I think if Mr. Fixa is enjoined, that will be sufficient to handle the problem.

Judge Bone: That will be a novel idea but maybe—

Judge Wollenberg: What are we going to do? Mr. Krause is calling Mr. Fixa.

Judge Bone: It is getting pretty close to noon. Maybe we ought to go over—

Judge Zirpoli: I would suggest, if I may, gentlemen, that we defer calling Mr. Fixa and permit Mr. Krause to continue his argument. I am still interested in the basic question: Assuming that there is a list, and the basic ques-

tion that I indicated before, what basis is there for declaratory relief if everything that could be achieved by the actual issuance of an injunction itself has already been achieved?

[fol. 127] Mr. Krause: All right, Your Honor. If the Court wants to defer the calling of Mr. Fixa, I have no power over that. In my mind, I would call Mr. Fixa right now. If the Court wants to defer that, we will go ahead.

Mr. Collett: If the Court would excuse me, you have allegations in your complaint. On a motion to dismiss I think it is more or less a well-recognized principle that for the consideration of the motion well-pleaded factual allegations are to be taken as true. Now, if we can take that—

Judge Zirpoli: That isn't the point. The point is mootness of the controversy. Your question of mootness cannot be determined from the pleadings alone. It can be determined in part from the record, which includes also the ruling of Judge Burke, but it cannot be determined from the pleadings alone. If that were the fact, we wouldn't have any problem at all this morning.

Mr. Collett: Then to what extent—The fact that Judge Burke's order is in the record and the concession by counsel at that time. He was there and he was given the opportunity to present whatever he had and the subject matter is closed, as Your Honor—

Judge Zirpoli: That is why I suggested that Mr. Krause proceed with his argument and we will see what he has to say, in view of the observations that I made, and maybe we will be in a better position to determine then the need [fol. 128] for the testimony of Mr. Fixa.

Mr. Krause: All right. Let me say this: There was no concession that the mail was accepted. The only concession was because of the confusion surrounding this particular package, this particular package that Mr. Collet was delivering, is an absolute—

Judge Zirpoli: I know, but whether he accepted it or not, this is a rather technical argument. It was there and it was available for him, and this is picking at straws now when you are making your argument on this point.

Mr. Krause: I want to make it clear that we do not concede that it was delivered as we desired it.

Judge Bone: Are you putting it on the technical ground that a uniformed postman did not deliver it? You were in court all morning there with Mr. Collett and some of that stuff that he is arguing about and debating about, but must we wrestle with things like that? I am ill-disposed toward wasting time in trying to figure out the reason for certain postures that will arise in the case. What's the difference? The fellow got the mail. He said he wanted it. He wanted to receive it.

Mr. Krause: To our mind it is the same thing as handing a piece of mail and saying, "Now, if you accept this piece of mail, you realize that——"

[fol. 129] Judge Bone: Oh, no, no. You are drawing on your imagination there. It is not the same, sir.

Mr. Krause: It was not an unconditional delivery.

Judge Bone: Don't make that argument with the idea that it is going to find response in my soul.

Mr. Krause: My point is that this wasn't an unconditional delivery, the same as if someone delivered a package to you and asked you to sign a slip saying that you owed ten dollars.

Judge Bone: Did they ask this fellow to sign a slip?

Mr. Krause: It is different, and we maintain that this mail has been and is being and will be in the future delivered under unconstitutional conditions after it has been searched——

Judge Bone: Did anyone in court ask you to sign a slip of any kind?

Mr. Krause: No, sir.

Judge Bone: In other words, if I handed you a package in this court, why, I didn't deliver it to you unless I got a receipt from you in order to lay the foundation for some idea? The man got the mail and he is now getting it. That is what Judge Zirpoli is talking about.

Mr. Krause: All right.

Judge Bone: He will continue to get the mail.

Mr. Krause: We also have Mr. Heilberg in court, and ordinarily I would call him next—but I presume the Court [fol. 130] would prefer to hear argument before any testimony.

Judge Zirpoli: Well, what is he going to testify to?

Mr. Krause: He would testify that he has in the past

received considerable mail from all foreign countries. As a matter of fact, his unofficial job requires him to receive mail from foreign countries. He is a director of his particular organization which is the International Esperantes Union, and he expects to continue to receive mail from all foreign countries including Russia, China, Bulgaria and other countries.

Judge Zirpoli: I assume Mr. Collett will concede all this.

Mr. Collett: Yes.

Mr. Krause: All right. And we expect to obtain testimony from him concerning the kind of delivery—delivery in quotes—which was made in Judge Burke's court and the fact that he did not accept that delivery. We expect to introduce certain evidence—

Judge Zirpoli: This is an expression of his intention. Aside from the expression of his intention, do you intend to controvert the statement contained in the finding of Judge Burke?

Mr. Krause: No; the mail was tendered, and that is all that Judge Burke found. Judge Burke found that there was a delivery of the mail, not that it was accepted. That order is quite clear, and I think we should present that order to the court in three copies along with the transcript [fol. 131] of the hearing before Judge Burke, and I will undertake to do that. But the order is quite clear, that Judge Burke said that the package was "released" in court; he doesn't say that it was accepted in the order.

Judge Zirpoli: All right, what is the issue as to proceeding with your first witness? I think everything you say is pretty well conceded. What is the other offer of proof on the part of the plaintiff?

Mr. Krause: That he does not want to be on any list; that he has received indications showing that he is involuntarily on the list whether he wants to be or not; and that being on the list would have undesirable consequences since he is not a citizen of the United States. He expects to apply for citizenship. This may be used against him. Since his business relations are delicate and as such, if it should ever be publicized that he is a recipient of communist political propaganda by some government agency, he would suffer irreparable harm. And he has the right to privacy. He doesn't want the government or anyone else knowing

what his mail is^a and he doesn't want the government or anyone else labeling his mail or telling him what is or is not communist propaganda. That is what we would prove by Mr. Heilberg.

May I call on Mr. Blease, now to answer your question, Judge Zirpoli, because we have undertaken a split in this work and he will answer the question of what this court could do.

[fol. 132] ARGUMENT ON BEHALF OF PLAINTIFF BY
MR. BLEASE

Mr. Blease: May it please the Court, my name is Coleman Blease. I would like to address myself to what appears to be the merits of this case and the posture of this case at this point.

There are three separate and outstanding facts which are the subject, we believe, of injunctive relief and we have already mentioned some of them, but let me summarize.

If you accept our contention that the mail was not in fact delivered to the plaintiff, that the mail is still in existence, that the mail is still in the constructive possession of the Government, then an injunction can force or compel the Government to go and find that mail, unlabel it, or, rather, deliver it free of the labeling process which is being challenged.

The mail has not been destroyed so far as we know. The mail was abandoned in the courtroom. That's one, and only one, subject of injunctive relief.

Secondly, the plaintiff has received mail—

Judge Zirpoli: Is that act of abandonment the act of the government or the act of your client?

Mr. Blease: It is our contention that the abandonment was an act of the government.

Judge Zirpoli: Have you any right to claim now with relation to that specific mail?

Mr. Blease: Yes, we do, and for a number of reasons, [fol. 133] Your Honor.

The legal delivery, we contend, depends, among other things, on whether the statute which is in issue here permitted such delivery. The statute is quite specific about that. May I refer to the complaint?

In Paragraph IV there is contained the statement of the message to the addressee. The message says:

"This office is holding unsealed mail matter addressed to you from a foreign country. The Secretary of the Treasury has determined this mail to be Communist political propaganda. It cannot be delivered to you unless you have subscribed to it, or otherwise want it."

Now, the statute—and I believe this is an accurate reflection of the requirements of the statute—the statute says you cannot receive this particular mail; it cannot be delivered unless you are willing to sign a statement that you want mail which has already in fact been seized first and labeled as communist propaganda.

Judge Zirpoli: It says more than that, though.

Mr. Blease: What?

Judge Zirpoli: It says "otherwise express your desire," does it not?

Mr. Blease: It has to be an expression of desire that you want this mail subject to these conditions. I think, if any—[fol. 134]—thing, our plaintiff refused to sign that—

Judge Bone: Subject to what conditions?

Mr. Blease: Subject to the conditions that the mail be detained, seized, opened, examined, classified as communist political propaganda, and then sent on.

Judge Bone: Are we able to brush all of that out of the law, or is it in the regulations?

Mr. Blease: That is, among other things, the subject of injunctive relief, and if you accept the fact that a single delivery broke the law, then we reach the precise controversy—

Judge Zirpoli: I am pretty well satisfied in my mind—and I am not speaking for the rest of the court now; this is the first affirmative declaration that I make—I am pretty well satisfied in my mind that the mail was delivered; that that tender before Judge Burke was a delivery of the mail; whether the postmaster himself did it or whether his then legal representative, the United States Attorney, did it, it was a delivery. That gives you the premise and the reaction of one judge.

Mr. Blease: I understand your position, Your Honor.

I would say again this is only one aspect of a three-pronged attack on this, and all of this is the subject of injunctive relief.

May I merely add, in response to the comment of Your Honor, that it is our contention that the Government has [fol. 135] had to violate the terms of this statute in order to attempt to moot it; and if that is not the subject of the clean hands doctrine, I don't know of anything that is. In other words, to moot this case, the Government, I think, would perhaps candidly admit that unless they can deal with this case procedurally—

Judge Zirpoli: The Supreme Court didn't intercede in the Massachusetts case in which they presumably had to wink at the law.

Mr. Blease: What Massachusetts case?

Judge Zirpoli: Involving the use of contraceptives and the advice with relation thereto.

Mr. Blease: That was totally irrelevant. The statute there had never been applied. This statute now is applied, and they are applying it again. This statute is not only being applied to the case, but our client, Mr. Heilberg, has received mail, is receiving mail, and expects to receive more mail in the near future, which brings us to the second point of injunctive relief, namely, we are contending, among other things, that it is unconstitutional to detain the mail, to open the mail, to read the mail, to classify the mail by a category which is not an objective category as was applied in Esquire, the difference between advertising material and non-advertising material, for example, but a category which reflects upon the quality and the value of the material.

Judge Zirpoli: Who does all this reading—the Post Office [fol. 136] or the Customs?

Mr. Blease: Your Honor, the Customs Office, the Customs Department does that, and I will get shortly to an examination of the statute itself.

And I think, as our pleading will reveal, there is a long line of cases—

Judge Zirpoli: Does Customs not have the right to open anything that comes from outside the United States?

Mr. Blease: They do have the right to open it.

Judge Zirpoli: They do? They have the right to open

anything that comes from outside the United States, regardless of what it is.

* Judge Wollenberg: If it comes within the boundaries.

Mr. Blease: Let me say this: They do not have the right unconditionally to open everything, and that is the subject of this suit. We are not contending that the Government cannot under some circumstances open mail. For example, we have conceded in many places here that freedom of speech does not reach certain kinds of classifications and registration. What we are contending is that this particular condition is unconstitutional, not that all conditions are unconstitutional, but this particular condition. And therefore we can concede the general point readily because it is not at issue here. All the cases that have been cited deal with mail fraud, deal with obscenity, deal with [fol. 137] incitement to violence, deal with other categories which we concede are the subject of the government's powers or the mail powers, but that is not at issue here.

We are dealing with matter which is not in any of those categories or alleged to be in those categories. It is mail which otherwise is a normal kind of mail coming from particular kinds of countries and has been classified.

So that if you agree with our contention that that is the subject of equitable and injunctive relief to reach not past actions but the immediate and real possibility that mail which he has received and has conceded receiving—and the testimony will reflect the fact that he received additional pieces of mail; we will show that during this time span that he frequently received mail; that he is receiving more mail and this will again be subject to the procedures under the statute, and it is those procedures that we are contesting, and it seems to me that those procedures are clearly subject to equitable relief, if you reach the merits of this case apart from the mootness question.

You may disagree when we reach the merits as to the contentions we are making, but it seems to me that you cannot claim that we cannot reach the merits because there is nothing to reach, there is nothing the subject of injunctive relief.

The third aspect of this case which is the subject of injunctive relief is the fact that plaintiff's name is on a

[fol. 138] list, and the reason why we attempted to call Mr. Fixa is to prove that there is a list.

We will also introduce a card which is the card form which I read to you here in Paragraph IV of our complaint which had been filled out by the Postmaster General's Office and mailed to the various post offices. In other words, the Government has filled out the card which Heilberg had refused himself to fill out; and if that is not an indication of the fact that he didn't desire this in this form, then I don't know what is.

So that we are prepared to prove that the list exists; that his name is on the list, and we will be prepared to show not only that Mr. Heilberg has been deterred himself, but it should be clear from the face of the complaint that he was forced to make a choice between receiving this particular mail before getting his name on the list, and he chose not to receive the mail and he was deterred in the clearest form possible.

We will show not only that he was deterred, not only deterred in that sense, but he was deterred by what we will seek to prove as very real fears in the context of America today: that being listed in this category casts unfavorable light to the extent people are deterred from receiving that which they would otherwise receive.

Let me be very clear about this point. The free speech [fol. 139] issue here isn't whether or not you would be willing to be so classified. The question, the factual question, is whether or not people are in fact deterred; for whatever reason, rational or irrational, if they are in fact deterred and interfered with because of their fears, whether groundless or not, if that is a fact, then there has been a direct and immediate interference with freedom of speech, to wit: they have not read that which they otherwise would read. Without more, that is the real heart of the free speech issue when we come to it, and that is a matter, when we reach the merits, that we will be prepared to prove in a number of different ways, by three specific ways, to wit: by the testimony of Mr. Heilberg, by the testimony of others and by analogy to the case materials which will reflect what we consider to be analogous situations with respect to deterrents.

May I at this point merely point out one case which the plaintiff has cited in his memorandum, the Talley case, to show you, and which we believe to be on this point—

Judge Zirpoli: The Talley case is very clear that if there had been some indication in the legislative history the case might have gone entirely the other way.

Mr. Blease: No, there was legislative history—

Judge Zirpoli: The Government hadn't shown any justification for putting on the name, and that was to avoid fraud. Anything of that character would have determined [fol. 140] the Talley case the other way, and all the judges were entirely agreed on that, the majority and dissenting opinions.

Mr. Blease: I think the point here, Your Honor, is that the Government does have the power to reach certain kinds of ills, to wit, fraud, or many kinds of categories, obscenity, for example. However—and there are two prongs to this particular case: A, if they use a method which is overbroad with respect to that material; that is, if they, in spite of the fact, do not use that sensitivity so that people are not deterred from reading that which in fact is not communist propaganda in this case, then we have a case. Clearly in the Talley case the method was overbroad even conceding that they wanted to produce fraud. The method which they used to reach fraud was with a mass technique of the type that we have involved here.

May I direct your attention at this point to the statement of Mr. Tyler Abell which has been attached to our memorandum in opposition to the motion to dismiss, to demonstrate two kinds of things: the way in which the statute operates and should operate and be correctly understood, and some statistical information which I think is revealing about deterrents.

There has been a confusion—and I want to try and clear this up because it has not been particularly clarified heretofore—May I go over the steps by which this statute [fol. 141] is put into operation?

To begin with, all mail which is coming from the specified communist countries is sent to the screening centers. At the screening centers the exempt mail—and exempt mail is that mail—

Judge Zirpoli: Let's stick to the first step. Do you find

that objectionable, that all mail coming from communist countries should be sent through a particular station? Is that objectionable?

Mr. Blease: To this extent: to the extent that it imposes a delay which would not otherwise occur.

Judge Zirpoli: Don't you think we ought to know what the communist Russians or someone else is doing with relation to our own country? Don't you think we ought to have some knowledge of the nature and extent of their propaganda?

Mr. Blease: We are—Yes. The answer is "yes."

Judge Zirpoli: And we ought to have some knowledge of the nature of it, too.

Mr. Blease: That's right, and we—

Judge Zirpoli: All right, you would have no objection to it going to a particular center?

Mr. Blease: No.

Judge Zirpoli: No.

Mr. Blease: We would have no objection but at this point I don't think it is involved at all—

[fol. 142] Judge Zirpoli: I am trying to follow you step by step.

Mr. Blease: We would object to the procedures which have been utilized.

Judge Zirpoli: Do you object to the mail being opened to determine what the nature of it is?

Mr. Blease: We object to the mail being delayed, opened, searched and classified.

Judge Zirpoli: First you have to open it. Do you object to it being opened?

Mr. Blease: Yes.

Judge Zirpoli: (Continuing)—to ascertain whether there is a plot to bring about a national feeling of rebellion to overthrow the government by force and violence? We know what the communist form of propaganda is, world revolution and the like. Do you object to Customs reviewing it, opening it to ascertain these questions?

Mr. Blease: Your Honor, there are other statutes which are not at issue here. There are other statutes, for example 19 U.S.C. 1305, which permits the detention of matter which is believed to be matter inciting violence or obscenity or things like that. We are not—

Judge Zirpoli: This could be an aid thereof, could it not?

Mr. Blease: I want to distinguish those cases because they are not analogous and we don't want to argue those [fol. 143] cases. We can concede arguendo that those are proper methods at this point.

Judge Zirpoli: Do you concede, then, it is proper for Customs to open this mail?

Mr. Blease: We will concede the general point that under some conditions it is proper to open the mail, but we are not conceding that under all conditions it is proper to open mail. Specifically, we are not conceding that it is proper to open mail under these specific conditions. It is clear under the cases that the mail may be opened under certain circumstances, and there are other statutes that deal with this. And I might add with respect to one of the expressions of the judges here that there are specific federal regulations that permit any citizen who does not want to receive communist political propaganda to notify the Postal Department and then leave that job up to them. That is already on the statute books. We are not contesting that. Anybody who is annoyed at what he is receiving can delegate that authority to the Postal Department to take care of it for him. That is already in the federal regulations. This is supposedly to achieve the same result which is already available to those persons who, when they in their own independent judgment of how the classification is going on, are content to leave it up to the Postal Department to do it.

Judge Zirpoli: How am I to know that I am about to [fol. 144] receive some specific propaganda? How am I to know?

Mr. Blease: I suspect you could, without receiving anything—

Judge Zirpoli: How am I to know? Do I have to wait until it arrives and then my neighbors and everyone sees that I have received a package?

Mr. Blease: No. If you are overly concerned about this, Your Honor, I suspect before you received anything you could send a letter or a note down to the Post Office saying, "Will you please detain all matter of this kind?" That is taken care of and nobody has seen anything.

On that point, may I say that the card which is sent out—

this mail comes in closed packages; the card which is sent out and which is delivered is a postcard and is in the guy's mail and it says, "We have waiting for you mail which we have determined to be communist propaganda which has been addressed to you."

Judge Bone: Mr. Blease, does this package in which this mail is encased and delivered have anything on the wrapper indicating its contents?

Mr. Blease: We have only seen a few of these pieces, Your Honor. The pieces we have seen have stamped on them the country and in some cases the magazine which is being sent out. But that is not required. I suspect there is some of this mail which, apart from the addressee, reveals nothing.

[fol. 145] Judge Bone: Is there anything there that would reflect on the man's character, his morals or anything else?

Mr. Blease: Depending on how you view that, there may or may not be.

Judge Bone: The moment he takes it into his house, it is within the cloister of his home and he does what he pleases. If he is like me, he would throw it in the trash can.

Mr. Blease: That's right.

Judge Bone: I wouldn't even allow the Postmaster to annoy me by asking me to write him a card. It is none of his damn business whether I like it or not. I put all that kind of mail in the trash can.

Mr. Blease: That is precisely our point.

Judge Bone: If this comes to him in a package that hasn't anything on the outside, how is he besmirched among his neighbors?

Mr. Blease: He may not be in fact. He may be more besmirched—

Judge Bone: His feelings are hurt, is that the idea?

Mr. Blease: Well—

Judge Bone: If I lived next door to this man and he had been getting this several times and I didn't know what was in it and cared even less, how would the effect on my mind be to his disadvantage? Are you conjuring up devils and demons and going back to witchcraft? What kind of argument is that?

[fol. 146] Mr. Blease: I am glad you made the point—

Judge Bone: Who would give a hoot what kind of mail he got unless it had a stamp on it that it was communist mail? That might mean something.

Mr. Blease: Apart from this program, Your Honor, they may never know he has been receiving it; until it arrives in the mail.

Judge Bone: If anybody sees it, he is responsible for that, isn't he?

Mr. Blease: Then he can throw it in the waste basket or do whatever he wants to with it.

Judge Bone: No, no. If anybody knows that he got this mail from some Commie nation, it is because he showed it to them?

Mr. Blease: That's right.

Judge Bone: So by his own act he has laid the foundation for you coming into court and asking for an injunction.

Mr. Blease: No, no.

Judge Bone: You say the package comes enclosed in some sort of wrapper or envelope.

Mr. Blease: What I was comparing, Your Honor, was the operation of the statute against the non-operation of the statute. If the statute were not in existence, all that would happen—

Judge Bone: It all gets back to this so-called list?

Mr. Blease: Yes, but what happens—

[fol. 147] Judge Bone: How does it part company with the basic idea that the thing that this man is talking about and worrying about is this alleged list which is probably a box where they have this mail so if they want to check up, they can find out whether this fellow has ever written them about mail? He may have written them before.

Mr. Blease: What we are saying is that what this statute has done is to bring into existence a list which otherwise would not exist; the mail would be received at his home; if he didn't like it, he could throw it in the waste basket. If he didn't want the mail, he could read the federal regulations and tell them he didn't want any more and that would be the end of it. The neighbors might never even know.

Now, under this program, he receives a neat little card saying, "You have received communist political propa-

ganda" on the face of it. It is open to the postman and the like, and there it is. So it seems to me that the operation of this program is what besmirches him, and that seems to me to be the subject of injunctive relief.

Judge Bone: They give him a card form——

Mr. Blease: Yes.

Judge Bone: Is there any compulsion on him to drop it into the mail or put it in an envelope and mail it to Mr. Fixa, the Postmaster?

Mr. Blease: No. As a matter of fact, if he doesn't answer [fol. 148] it——

Judge Bone: So if he drops it in the mail, he willfully and deliberately injures himself and then lays that as a predicate for suit.

Mr. Blease: If he says he wants it——

Judge Bone: What?

Mr. Blease: If he says he wants it, then he has got himself on the list.

Judge Bone: I know, but he doesn't have to send a postcard through the mail; he can put it in an envelope.

Mr. Blease: Yes, he could, but the mail goes both ways.

Judge Bone: Like a man sticking his hand into a chopping machine and then crying to high heaven that someone has mangled his hand.

Mr. Blease: The mail goes both ways, Your Honor. It is not in an envelope when it comes to him.

Judge Bone: Somebody has to look at some mail in the post office.

Mr. Blease: However, and what we are contending here is not public opprobrium but it is also what could happen to him by way of reprisal within the government itself.

Judge Bone: Is there any publication of this list to the general public?

Mr. Blease: We will be prepared to prove that in the past there has been publication of parts of it, and we will [fol. 149] be prepared to attempt to prove that there is a reasonable likelihood that it will be in the future.

Judge Bone: Is there any publication of such a list of these people? I have lived in this city 20 years and I am not aware of anything. This is the first time I have ever heard of anything like that. Maybe my rights are infringed by Mr. Fixa not sending me notices that he has a list

down there that I ought to look at. Maybe I ought to criticize Mr. Fixa and write the Postmaster General and have him fired for robbing me of the constitutional right to know exactly what goes on all the time in his office. Where is this sort of censorship to continue—the censorship of Mr. Bone, a private citizen, over the Postmaster?

Judge Zirpoli: Have you got anything over and beyond the statement of Mr. Tyler Abell? Do you have anything that could conceivably be stronger than that as far as the list is concerned or the use thereof. Do you, actually?

Mr. Blease: We have referred in the memorandum, Your Honor, to certain publications specifically. There are others at this time which we did not put in because it was our understanding that the subject of this hearing was the question of mootness. When we get to the merits, of course we will introduce these other publications and we will attempt to introduce actual testimony, perhaps the testimony of others who have rejected the postcard and attempt to elicit the testimony of others to show that [fol. 150] the fact is affirmatively. When we show these kind of facts, it seems to me it brings us clearly within the purview of the First Amendment and the subject of injunctive relief.

Judge Bone: Mr. Blease, is there anything in this case of substance except your client's contention that presently in the Postmaster's office is some correspondence with the Postmaster and beyond that, so far as physical facts go, it is the assumption of this man that somehow that is going to be broadcast to the public to his great injury; or is it because his feelings are outraged? It is strange that nothing has ever been said by the newspapers of any list of any kind here.

Of course, I assume you know—if you don't, I worked around the prosecutor's office—there is a lot of information that gets into a Police Department and they make a note of it on their records so that if something goes wrong they have a MO of this man's criminal propensities. I suppose you think the courts ought to stop that.

Mr. Blease: That is not at issue here.

Judge Bone: If he has committed another crime, is he entitled to an injunction to have that blotted out of the police records?

Mr. Blease: Again we are not contending that all those things are bad or that all lists are bad. We are contending [fol. 151] that this list right here—

Judge Bone: Where is this kind of court interference with operations of this kind to end? It would swing wide all these doors and we would be regulating everything instead of the President and the Executive Department regulating a few things left in the country.

Mr. Blease: There have been many cases dealing with the right of anonymity, Your Honor, and the Supreme Court has ruled—

Judge Bone: I have been reading them for 54 years and I am still confused by the new array of charges being made continually. They astonish me with all this experience back of me in legislative bodies, state and federal.

Mr. Blease: The point is that the court sometimes has said you must disclose and sometimes that you must not disclose. If you are making the camel's nose argument—

Judge Bone: If we had a little more security in this country, there wouldn't be so many murders, there wouldn't be so much outrage being perpetrated by fellows. I have an old-fashioned notion because armies of boys are being carried on battle fields to try to make the country a little safer for decent people. Perhaps you don't share that view but I have a very strong feeling about it. I am talking about real human liberties, not some fellow's feelings.

Mr. Blease: May I—

[fol. 152] Judge Bone: About a thing that hasn't been publicized—I never heard of this, and I don't think anybody in this court ever heard of it who is not perhaps immediately associated with the post office. And when a man deliberately opens a package and tells his neighbors deliberately that he has gotten this kind of package from the Post Office Department, he wants some vindication of his right to object to that?

Mr. Blease: That is not the point.

Judge Bone: I know it isn't the point with you. It is the point with me. That is what I want you to make clear to me. And that is what you will probably have to make clear to the Supreme Court of the United States, if you get there.

Mr. Blease: May I just complete the way in which this statute operates? When this mail is sent to the screening points, that which is exempt mail, which is contained in Subsection (c) of Section 4008, is sent on. It is not opened or otherwise looked at, and to be in that category it has to be addressed to a governmental agency.

Judge Bone: Do you want a declaratory judgment from us abolishing that screening process?

Mr. Blease: Yes.

Judge Bone: You do?

Mr. Blease: Yes.

Judge Bone: Are there any other departments where it will reach in in the area of this injunctive order? We might [fol. 153] as well stir up the animals right while we are at it.

Mr. Blease: After the exempt mail is sent on, that matter which is left over is then detained at that point—as a matter of fact, Point No. 5 in Mr. Abell's statement says:

“Customs examines the detained mail to determine what is and what is not propaganda.”

All of that mail, then, is subject to opening, examination, reading and classification. Then that which is non-propaganda—Mind you, it has already been processed, detained, opened, et cetera—is sent on and then—

Judge Zirpoli: Do you find that objectionable? Do you really find that objectionable?

Mr. Blease: Yes.

Judge Zirpoli: Assuming there are millions and millions—eight hundred million, nine hundred million pieces of mail—that come through and they have this privilege of sending it other than first-class, and they are coming from a communist country, a country with whom we are fighting throughout the world on the matter of ideology, and they are to be spread about this country and we are to take care of the expense of distributing this less than first-class mail and we don't indulge in any process of this character, and we proceed to distribute it indiscriminately. What happens? Instead of a billion, you will see within six months or a year you have two billion pieces, and the Government continues to incur the expense of

[fol. 154] spreading this type of propaganda. Isn't that the consequence of it all?

Mr. Blease: It may very well be that the government has the power to prohibit all such mail from communist countries, but the power to prohibit does not include the power to condition by unconstitutional provisions, if in fact you let it in. And if you will refer to the restriction in Mr. Abell's statement—

Judge Zirpoli: The power to prohibit also includes the lesser power, does it not?

Judge Wollenberg: I should think so.

Mr. Blease: May I suggest that this program would be far more costly than letting the mail go through according to the figures here. Most all of the mail is delivered anyway. It is either in exempt categories or is subscribed to or otherwise the people want it. We then have a postcard, which costs an additional amount of money, and that has to be marked and you have to mail the piece on, so there is two pieces there. And I think it is the subject of testimony furthermore, Your Honor, if the Government wants to rely on the cost of this program, we will be prepared to prove that this is more costly than—

Judge Zirpoli: It is a question that lies with Congress. That may be the basis of it. Whether it is right or wrong is not for us to say.

Mr. Blease: If this comes to the question—and we are [fol. 155] not saying that it will at this point—that what you are doing is balancing the Government's purpose against what has happened to our client, then this question will become entirely relevant because then the question of why they want to do it will be truthfully answered. If they want to do it to save money and create employment, it seems to me there is no necessity for doing it. If there is no necessity for the program, then I think the Court would say—

Judge Zirpoli: You are right; it is not for us to decide on this program. I don't agree with you on the first premise, so proceed.

Mr. Blease: To finish off the way in which this occurs, if the mail is determined to be communist political propaganda and has not already been dispatched and they have no indication of whether the person has subscribed or

otherwise wants it, then they mail the notice to him. I must point out at this point there are two kinds of detention involved here. There is the first detention when it goes to screening and the like, and there is the second detention when they hold it for the purpose of mailing the card out. With respect to our client, only the second detention has been obviated, not the first detention, and we are still claiming that the mail is being detained for the purpose of search and seizure and still brings us before this court for injunctive relief. The second detention has been obviated [fol. 156] by the fact that they are now sending the mail through, but that would be merely a source of additional aggravation if they were not doing that.

One last point on these figures is to show that we have what in fact on the face of this case is the apparently irrelevant figures, and the relevant figures from the Tyler Abell statement are those figures of the notices that were sent out and either returned saying "We don't want it," or not returned. And I have gone through the compilations here somewhat. Of those persons who have been sent notices—and as far as we know, this is the only category of people who know about the program, because the exempt mail goes on through. You never know about the program, because there is nothing to indicate on the mail itself that anything has happened to it—but of the people who are notified about the program, those people to whom notices have been sent, that only 34% of those people indicated that they wanted that piece or all the pieces; that is, two-thirds of the people to whom notices were sent in one way or another manifested the fact that at that level they didn't want it. Some of those people may have a variety of reasons for which they don't want it, but all we can suggest here is that it seems obvious to us that some of those people were frightened by the possibility that they would be identified as having received communist political propaganda; and if that is the case, if so much as one person has been deterred—and we have alleged that already and we will prove that by Mr. Heil- [fol. 157] berg—then we have an interference with freedom of speech, and it seems to me we have a justiciable issue before the court relating to our client, and if you want to go on further, we can prove that it relates to other people

as well. But in the first instance we are attempting to demonstrate that our client has been deterred and that others on the face of it have been deterred as well, and that it seems to me to make out at least a sufficient case to remove us from the mootness point. So there is relief which is still outstanding with respect to this, and then may I point out that there are two other subjects of relief here as well; that is, he has been injured because he has been placed in a class, and if you are in certain classes, there can be an injury by virtue of being placed in the class.

Judge Bone: I think we will stand in recess until two o'clock, and I want to suggest to counsel, if they have witnesses they propose to use, to have them here at two o'clock.

(Recess to 2:00 o'clock p.m. this date.)

[fol. 158]

AFTERNOON SESSION

Thursday, January 2, 1964

2:00 o'clock p.m.

Judge Wollenberg: Go right ahead.

Mr. Blease: May it please the Court, perhaps two minutes would finish what—

Judge Wollenberg: Very good.

Mr. Blease: —I have to offer. I would like to make one correction. I was in error this morning in stating that the notices were in the form of postcards when they were sent to the addressee. They were included in a letter, I am now informed, and the letter itself is stamped that it was mailed from the Foreign Propaganda Unit, and that's the only surface indication of the nature of that which is contained in this notice.

Judge Bone: I have one little request to make of you gentlemen. If there is some text in this volume that our brother Collett handed us, you evidently know where it is in this huge volume, could you give us the pages which we should examine—the text of this matter? I don't like to trouble you gentlemen, but I would like to at least read it and see what this argument is about.

Mr. Blease: We would be happy to submit—

Judge Bone: Would you do so? Just a little slip of paper, informally, showing on what page we will find the [fol. 159] thing that probably has some germaneness here.

Mr. Blease: We have indicated a couple of references in our memoranda to it. Beyond that, we would have to—

Judge Bone: Well, could we find it in that?

Mr. Blease: Not all of the references, Your Honor.

Judge Bone: Just a little piece of paper showing the pages on it, that's all.

Mr. Collett: If the Court please, it might help you to this extent: The statement of Congressman Cunningham with regard to—

Judge Wollenberg: Well, why don't you give us a memorandum on this also?

Judge Bone: Just a little informal piece of paper with the pages, so we can read them.

Mr. Blease: We would be very happy.

Judge Bone: We don't need another brief on that.

Judge Wollenberg: No.

Mr. Blease: Secondly, I don't think I made it clear that this statute applies to all classes of mail, with one exception, and that class is the class of sealed letters, that is the only specific exemption in the statute, are sealed letters, so it includes all mail in classes two, three, and four, or whatever classes there may be, and it includes first-class mail other than sealed letters. There is a definition which we have included in our memorandum of first-class mail, [fol. 160] which you will find includes sealed matter of whatever kind other than the letters covered here.

Judge Bone: That is regardless of its origin?

Mr. Blease: Regardless of its origin. There is a definition of what first-class mail constitutes, and this statute does not exempt all first-class mail, but merely that portion of first-class mail which is in the form of sealed letters. If you had a sealed envelope, for example, which is obviously not a letter, and some of the items appear to be in that form, it would be subject to first-class postage under that definition and would be sealed matter and first-class postage, as we understand the definition.

Now, it may very well be that some of those items which we have come within the purview of the statute.

Now, there was one other point with respect to the injuries involved here, and that deals with the classification argument that we have made. We have argued, among other things, that this is a violation of the equal protection notion which is contained in the due process of law, the Fifth Amendment; that is, by virtue of the fact that Mr. Heilberg and others in his class have been separated from those who are —

Judge Zirpoli: Are you serious on that argument? In other words, you're protecting, presumably, your civil rights. Do you quarrel with the fact, does he quarrel with the fact they did exempt, say, the universities?

[fol. 161] Mr. Blease: We are not quarreling with the fact. We are saying that the fact that they have made these classifications is not a reasonable classification, which is subject to attack. That is, there would be no basis for having a distinction unless the distinction meant something, and what it obviously means in this case is that our client, among others, is less able to understand for himself

the nature of communist political propaganda than those who are in the exempt category.

Judge Zirpoli: All they are saying is that these institutions have more right and need for it than individuals, as individuals. That's what they are saying.

Mr. Blease: But the question of need in a democratic society seems to me to be one of equality, no matter who is involved. We all need to be informed in order to participate.

Judge Zirpoli: I know, but is the government going to subsidize everybody? This is a mail-matter question, this is a question of classification of mail and the manner in which it will be handled. This is the statute under which it was enacted.

Mr. Blease: On that point, Your Honor, although classifications are permitted, classifications which turn upon unconstitutional conditions are not permitted; to wit, you cannot have a classification which makes the unreasonable assumption that our client is less able to make this decision than others.

Judge Bone: Mr. Blease, is there anything in the regulations of the International Postal Union, with head-[fol. 162] quarters at Berne, Switzerland, that would bear on this? You know, every nation in the world belongs to the International Postal Union, unless it would be the Soviet system and the Chinese Communist system.

I remember talking to some of the spokesmen for the University of San Francisco and they wanted to get into this communist problem, and I said how are you going to get into it unless you know what it is? You can't tilt lances at windmills, you are not another Don Quixote in the educational field, why don't you get all the communist literature you can? If you are going to fight something, you have to fight with an understanding mind. Well, they did put in a course there in communism, and I guess they probably get all this questionable information of some sort, they must get all this stuff, and it's in aid of institutions who are trying to understand what the international communist movement means.

Mr. Blease: Well—

Judge Bone: Are they in a position to do a lot of harm to individuals? Think of what it means to their student

body, who is getting the same literature that your client is getting.

Mr. Blease: Well, our point—

Judge Bone: Do you think they are perverting the minds of young Americans in universities by teaching them what appears in this literature?

Mr. Blease: I should hope not; I teach in one, Your [fol. 163] Honor.

Judge Bone: I'm sure that university would be delighted to get oceans of the stuff to see what's in it. As a matter of fact, I would be inordinately curious myself to know what these gentlemen are saying.

Mr. Blease: Well, I think that is our fundamental position, Your Honor. I think everybody ought to have access, without any deterrent.

Judge Bone: Yes, a few individuals, just a comparative handful of individuals, might find their minds somewhat perverted, but here, the great universities, with courses on communism, they're putting into the minds of an enormous student body some idea of what the communist movement of the world is.

Mr. Blease: I think the assumption that certain people are more likely to be perverted by reading is an impermissible constitutional assumption, Your Honor. What the First Amendment means to me, Your Honor, is that everybody is on an equal footing with respect to this.

Judge Bone: Well, would you put the universities on an equal footing with Joe Doakes?

Mr. Blease: With respect to the receipt of this matter, yes; with respect to this statute, yes.

Now, lastly, on the question of deterrents, I would merely refer you to the statement by Senator Clark, who argued against this bill when it reached the floor of the [fol. 164] Senate, and on the question of deterrents, what he said—this is just a very short paragraph: (Apparently quoting.)

“While the Committee proposal would permit persons who have received notices from the post office that communist political propaganda is being held for them to file requests for such matter and obtain it, clearly a stigma might be attached to those who attempted to exercise their rights in this regard. This would be especially apt to

happen in small communities, where such actions are almost surely to become widely known, the information might well find its way to the FBI files."

So, we would suggest, if Senator Clark, an esteemed member of our Congress, could reasonably find that there is a stigma, that we at least have made out a case for overcoming the question at issue here, namely, the justiciability of this matter with respect to the very real possibility of deterrents.

Now lastly, I would say that I think there would be no question of mootness, and really what we are dealing with here, the memorandum attempts to point out, are questions of mootness, rightness, standing and injury, and we tried to separate those in our analysis from what are all assumed by counsel for the government under the notion of mootness, there are really several questions, that but for the action of the government, and we contend an action which is in violation of the very statute which we are challenging, [fol. 165] there would be no question about the mootness of this case because we would be seeking to obtain mail which they have in their possession.

Now, as to rightness, it has been difficult for us to conceive of any other way in which this statute can be challenged. The source of the mail, I think, would lack standing, and frequently communist governments don't have standing; and if they did have standing, there would be some question of First Amendment rights in this country. The only people who are likely to not have any standing to raise this issue are the recipients, and the statute, unfortunately, is directed against the recipients. If it were directed against the governments, it might be an entirely different matter.

Judge Bone: Mr. Blease, do you know of any segment of the American society, of any prominence, that isn't stigmatized by all sorts of criticism? It starts with the Supreme Court of the United States, who a mighty large segment of the population, how large I don't have any idea, want to have impeached, starting with the Chief Justice. If you read the history of your country, sir, you know the things said about Abraham Lincoln during the war emitted atomic sparks a yard long. Do you know of any way of curbing this? Have you ever served in the legis-

lature we call the Congress of the United States? Can you imagine how much stigmatizing goes on in the mail that gets there? Did you ever hear of a congressman seeking an injunction against some fellow writing him nasty letters? [fol. 166] There wouldn't be enough judges in Christendom to try the cases, if they could all get into court.

Mr. Blease: I can only suggest we can deal with one stigma which is specifically at issue here, namely, this statute.

Judge Bone: I know, you're picking out one fellow who probably I never even knew he existed, and you make a big case out of it.

Mr. Blease: A federal case.

Judge Bone: A federal case, yes. And now here is the President of the United States stigmatized, the Chief Justice is stigmatized in language that sizzles, and he has no defense. Where do you think Justice Warren would get going into court and trying to stop the stigmatizing of the Supreme Court and the impugning of its motives?

Mr. Blease: It is one thing for one——

Judge Bone: Here is the chief court in the United States——

Mr. Blease: The stigmatizing here is being done by the government and that's the purpose of the First Amendment.

Judge Bone: Well, what are you going to do, indict the whole American people and undertake that thing which even Edmund Burke said was an impossibility, the indicting of the whole nation of people?

Mr. Blease: Not at all, we're merely indicting one [fol. 167] small statute.

Judge Bone: Justice Harlan said it is perfectly proper to criticize the courts, including the Supreme Court of the United States, and criticizing it to your heart's content.

Mr. Blease: Of course, it would be another thing if they started censoring mail going to the courts, and I think that would be a parallel issue.

Judge Bone: All right. Now, stigmatizing a senator or congressman may endanger his political life, destroy his whole public career. Do you think that's to be compared to what's likely to happen to your client?

Mr. Blease: It might be more, for all I know, Your

Honor, but there is a difference. The government is participating in one, and in the other it's not, and that is the constitutional difference, that is the function of the First Amendment, to keep the government from——

Judge Bone: Well, the constitutional history of the country, most of us have tried to understand, maybe we don't do a very good job of it, but we certainly have had our noses in books long enough to know something about the constitutional history of this country, arising largely from English sources. A lot of it is clearly confusing to many people. Lawyers spoke with bated breath about the Magna Carta for six centuries. It didn't amount to much to anybody in England. It spoke of free men being entitled [fol. 168] to a jury trial. You go back in English history and find out how many jury trials occurred with the little man over there, the little fellow who had no one to speak for him. Serfdom, virtually. The process of living was clamped down on him until he was like a Hungarian helot in the worst stage of Hungarian tyranny.

Mr. Blease: One of the most famous cases in constitutional history is that——

Judge Bone: That has always puzzled me, why these encomiums of praise for Magna Carta, when even the English didn't pay much attention to it for centuries? They had Star Chambers, if you know anything about your English history, and I think I do, and I imagine you must. If you're interested in constitutional history, you can't overlook what happened in England, Merry Old England.

Mr. Blease: I think this case is very similar to that which happened in Merry Old England, *Henrick versus Carrington*, which is the classic case that relied upon *Boyd*, the first great Fourth Amendment case, dealt with a search for seditious libel, and here we have a search for that for which the government claims is valueless, it seems to me a proper assumption, namely, communist political propaganda, the distinction being in one case we have a house, and in this case we have a guy's mail, but it seems to me that this case and our challenge is directly in line with *Henrick versus Carrington*, *Boyd versus The United States*, and carried down to the *Marcus* case, which [fol. 169] embodies these kinds of notions.

Judge Wollenberg: Have you more before you call the witnesses?

Mr. Blease: No.

Judge Wollenberg: All right.

Mr. Krause: We would like to call our witnesses, then, Your Honor.

Judge Bone: All right.

Mr. Krause: Call Mr. Fixa,

JOHN FIXA, called as a witness by the plaintiff, being first duly sworn, testified as follows:

Mr. Collett: If the Court please, for the record, since it might be a partial reply to Mr. Blease, we are still concerned with the Section 4008 of Title 39, and Section 4008 contains nothing about any lists of any kind, contains nothing about procedure. We have not before us in this complaint any challenge to the illegality of procedures, the unconstitutionality of procedures; the only thing that is before us is Section 4008.

Mr. Krause: May I suggest that Mr. Collett is interfering in the middle of my presentation to present arguments which he will have the proper place to present at the end of my——

Judge Zirpoli: I assume Mr. Collett is objecting with the further proceeding of this witness at all.

[fol. 170] Mr. Krause: He hasn't stated any objection, Your Honor.

Judge Zirpoli: Is that your objection?

Mr. Collett: Well, I didn't get a chance to really finish. Mr. Krause is in a hurry to move forward. Therefore, if I can proceed now, having in mind the remarks of the Court as well as counsel this morning, that the purpose for which Mr. Fixa has been called is with regard to a list, I am going to interpose an objection to any pursuit of testimony upon that basis at this time on those grounds.

Judge Bone: The objection will be overruled.

Mr. Krause: Thank you.

The Clerk: Will you state your appearance and your occupation for the record, please?

The Witness: My name is John Fixa. I am postmaster of the San Francisco Post Office.

Direct examination.

By Mr. Krause:

Q. Mr. Fixa, as postmaster of the San Francisco Post Office, do you take any part in the enforcement of Section 4008, commonly known as the Cunningham Amendment, dealing with communist political propaganda?

A. I am responsible for its administration, yes.

Q. In what area, Mr. Fixa?

A. Well, just to see that the regulations of the Post Office Department are carried out with respect to this unit. [fol. 171] Q. Oh, excuse me, what geographical area?

A. Oh, just for San Francisco.

Q. Now, do you know a man named Mr. Tyler Abell?

A. I know of him, yes, sir.

Q. I want to show you something attached to the Plaintiff's Points and Authorities as Exhibit No. 3 which is titled, Statement of Tyler Abell, Associate General Counsel of the Post Office Department, before the Postal Operations Subcommittee of the House Post Office and Civil Service Committee, June 19, 1963," and ask you whether you have seen a statement like this before?

Judge Wollenberg: Is this for the purpose of laying a foundation of some sort?

Mr. Krause: Yes, Your Honor.

Judge Wollenberg: Is there an objection?

Mr. Collett: He has just asked him if he has seen the statement. I am going to object the minute he asks the next question, this is a matter which is attached—

Judge Bone: Well, may we look at it for a moment?

Mr. Collett: Yes, Your Honor.

Judge Bone: I don't think I have that part of the record.

Judge Wollenberg: What I meant, Mr. Collett, what I was inquiring about was this: Do you raise any issue as to the fact of authenticity of the exhibit? In other words, [fol. 172] is this in fact a statement of Mr. Abell?

Mr. Collett: As far as I know, it is, Your Honor.

Mr. Krause: Then, with that stipulation, if it is a stipulation, I will withdraw the question.

Judge Wollenberg: That's what I thought you were wondering about. Is that agreeable, Mr. Collett?

Mr. Collett: That's all right.

Judge Wollenberg: All right, you're agreed.

Mr. Krause: Q. Now, Mr. Fixa, in the course of your enforcement and supervision of Section 4008's operation, is a list of persons who have indicated a desire to receive some or all communist political propaganda kept by any person under your jurisdiction?

Mr. Collett: I am going to interpose the same objection as at the beginning, if the Court please, pertaining to any list. There is nothing presented in this complaint which challenges the constitutionality or unconstitutionality of any regulation pertaining to any list, there is no regulation of any kind which is cited as being improper, invalid of any kind, he is just inquiring with regard to a list.

Judge Bone: We will have to decide on its relevance later; at the time being, at least, your objection is overruled. Is this intended to be a comment on mail coming into the country from foreign sources?

Mr. Krause: The intent—oh, Tyler Abell's statement? [fol. 173] Yes, it is, it's an indication of the way the program operates and its administrative operation, Your Honor.

Judge Bone: Well, does this deal with anything except foreign mail, mail of foreign origin?

Mr. Krause: The House Post Office Committee held hearings on precisely this statute and Mr. Abell was asked to explain the operation of the statute and this is the statement he made to explain the operation of the statute after it was already in operation.

Mr. Krause: Q. Do you remember the question, Mr. Fixa?

A. Yes, I do. As such, there is no list, we have no list; we have a card file.

Q. Would you describe that card file, please?

A. Well, it's a—roughly, it's a card, roughly about three by five, that is sent to—three by five inches—sent to each patron to whom a piece of mail is being sent, asking whether or not he wants this card, and he indicates his desires on this card and returns it to us and it is filed in this Propaganda Unit and it is maintained in a file.

Q. Now, is this card you spoke of commonly known as P.O.D. Form 2153-X?

Mr. Collett: If the Court please, may it be understood that the same objection is running to this entire line of questioning as to its relevancy and so on, and as to the complaint and the allegations of the complaint?

[fol. 174] Judge Bone: Well, I think we understand the basis of your objection, and it will be overruled for the moment.

Mr. Collett: Well, I want the record to show that the objection is running to each one of these questions, without my repeating them.

Judge Bone: That's right, that may be understood.

A: Yes, 2153-X is the form.

Mr. Krause:

Q. Should the addressee of this card, 2153-X, check the place on that card stating "Deliver this publication" and then return that card to the Post Office, would you describe what is done with that card when it is received?

A. That card is filed in alphabetical order and used as a reference for not only the current publication, but publications, that same publication that may be sent out in other issues.

Q. Is it filed in the same place, kept together with similar cards from other addressees indicating a desire to receive this mail?

A. Would you mind repeating that?

Q. Is the card, 2153-X, filed in the same place, in the same cabinet or box, with the cards of other persons who have similarly expressed a desire to receive communist political propaganda?

A. Yes, sir, they are all filed in alphabetical order.

Q. Where is that file kept?

A. It's in the Foreign Propaganda Unit.

[fol. 175] Q. And are there post office employees who have access to that list?

A. Both post office and custom employees. It's a joint operation.

Q. Approximately how many people work in that unit in San Francisco?

A. Oh, I would say, roughly, probably six or seven.

Q. Now, I would just—

Judge Zirpoli: I would like to ask a question. How long has that unit been in existence?

The Witness: I think it has been, Your Honor, about a year, as I recall, maybe a year and a half.

Judge Zirpoli: Was that unit created as a result of this act, or did it exist before the act?

The Witness: It did exist before the act, before this act, and it was discontinued. Then it was re-established as a result of this statute.

Judge Zirpoli: All right.

The Witness: I think it was established prior to that, not by statute, by some postal regulation.

Mr. Krause:

Q. Now, sir, do you happen to know why the unit was discontinued? Was it an executive order, do you recall that?

A. Insofar as I know, it was just a Post Office Department order. I have no knowledge beyond that.

[fol. 176] Q. Now, do you know whether the plaintiff in this case, Mr. Leif Heilberg, has a card contained in that file of cards of persons desiring to receive communist political propaganda?

A. I have no personal knowledge; I haven't seen it. I certainly suppose he has a card in there.

Q. Pardon me, I didn't get that.

A. I say, to my personal knowledge, I do not know, I haven't seen his card, but he was mailed one. If he returned it, it will certainly be in the files.

Q. Now, did you receive a subpoena to require you to appear today?

A. Yes, sir, I did.

Q. Do you have that subpoena with you?

A. I do.

Q. Does that subpoena require you to bring to this Court the list of persons desiring to receive communist political propaganda?

A. Yes, sir.

Mr. Collett: If the Court please, at this time I would like to call the Court's attention to 39 PFR 114.3, which is Post Office Regulation—

Judge Bone: I think, Mr. Collett, and my associates do,

that we are concerned here with whether this man's name appears in that bunch. We don't want a whole batch of material brought in here; I think it is unnecessary; not add [fol. 177] to the relevance of what is being presented. This is not a class action. This man says he is personally having his rights interfered with. Let's find out whether his card is in this bunch, a postcard, a letter, or whatever it may be.

Mr. Krause: I will withdraw the question, then.

Judge Bone: All right. The question is withdrawn.

Mr. Krause: I have no further questions.

Mr. Collett: No questions.

Judge Bone: You know, what puzzles me, it seems to me, if there is a vast amount of validity in an inquiry of this kind, the next step would be for courts to face the questions: Shall the M.O. files, the B.O.I. files, the Bureau of Information, Sacramento, the F.B.I. records, all be brought into court because somebody heard from someone that his name was in one of those files? Every man who has had some criminal affiliations probably would find his name in the F.B.I. files, or the Court; for the United States to say that those files must be destroyed, would be a pretty bald assertion of authority, as I view it, which is not to say that I might not be wrong, but I can project ahead and ask myself whether any defense whatever against criminality in this country of any form should be stricken from all records of law-enforcement authorities, is a prodigious step towards something, and I don't like to even think about it.

Judge Wollenberg: Have you some other witness?

Mr. Krause: Yes, we have Mr. Heilberg. We would like [fol. 178] to call Mr. Heilberg.

Mr. Collett: Maybe we can save some time. What is Mr. Heilberg going to testify to? Maybe we can have an offer to what he is going to testify to.

Mr. Krause: I have given that offer to the Court already.

Judge Zirpoli: I think Mr. Collett has stipulated to most of it.

Judge Wollenberg: There may be one or two things. Why not have Mr. Heilberg sworn, he is here, we are here —let's have the witness sworn and make the record.

LEIF HEILBERG, the plaintiff herein, took the stand, and affirmed and testified as follows:

The Clerk: State your name, your occupation and your address to the Court.

The Witness: Leif Heilberg, salesman.

The Clerk: Where do you live?

The Witness: 1801 Page Street.

Direct examination.

By Mr. Krause:

Q. Mr. Heilberg, you are the plaintiff in the action now pending before this Court, is that correct?

A. That's correct.

Q. Do you have any connection with any international [fol. 179] movement which would lead you to receive great volumes of foreign mail?

A. Yes.

Q. Would you describe that, please?

A. The Universal Esperanto Association.

Q. Do you in fact get large quantities of mail from foreign countries?

A. Oh, yes, practically every day.

Q. Does some of this mail come from countries normally thought of as communist countries?

A. Yes.

Q. Now, do you on occasion get mail from foreign countries, including communist countries, which is unsolicited?

A. Yes.

Q. Do you have any examples of that mail with you?

A. Yes, I have something right here which I received inside of the last couple of weeks—these two pieces.

Q. Would you identify those by the titles of what is inside?

Mr. Collett: If the Court please—

A. This one, I can't see, I don't know—

Mr. Collett: If the Court please, I don't know how far it is going to go, but it seems to me this is all irrelevant.

Judge Bone: Well, apparently he isn't going too far; he has only two envelopes.

[fol. 180] Judge Wollenberg: Let's see what they are.

Mr. Collett: Interpose an objection as to relevance and materiality.

Judge Bone: I would like to ask him about the Esperanto business, this synthetic language, just how much cultural development it has produced in him. I got interested in it once.

Mr. Krause: Well——

Judge Bone: Go ahead.

Mr. Krause:

Q. Would you describe the contents of those two envelopes that you have in your hands now?

A. Upon examination?

Q. Yes.

Judge Wollenberg: What's in the envelope?

The Witness: This is an Esperanto publication from Bulgaria. It is the organ of the Bulgarian Esperanto Association.

Judge Zirpoli: This doesn't purport to be communist propaganda, does it, or ever having been classified as such?

The Witness: This is——

Mr. Krause: We don't know, Your Honor.

The Witness: The second piece of literature is called "Bulgaria Today," or rather "Nuntempa Bulgario Esperanto" and this is mixed news about the Esperanto movement and a lot of propaganda about their progress [fol. 181] and so forth and so on. They always mix propaganda with facts in communist publications, it seems. That's the second piece.

Mr. Krause:

Q. Now, you testified you received both of these within the past few weeks, is that right?

A. Yes, couple of weeks.

Q. Is there a likelihood that you will receive in the future similar publications from communist countries?

A. Oh, yes.

Q. And in your opinion do these publications contain what would normally be thought of as propaganda?

Mr. Collett: Objection, if the Court please.

Judge Wollenberg: I think that may be entirely—
excuse me, I say I think this may be entirely irrelevant.
I mean, we are asking this man now for his conclusion as
to what this matter contained and there is no foundation
that anything—

(Colloquy between the Court out of the hearing of the
Reporter.)

Judge Bone: We are not going to be bound by the con-
clusions of any human being in this court room; we are
going to draw our own conclusions.

Judge Wollenberg: But the point that I wanted to
make—

Judge Bone: Whether or not it has any relevancy we
will have to determine in our own judgment. I hope it
isn't a brash judgment. There is a little more at stake here,
maybe, than appears on the surface. I want to ask this
[fol. 182] gentleman about the cultural aspects—

Judge Wollenberg: Yes, but let's—

Judge Bone: I'm interested in European culture that
made that whole continent—

Judge Wollenberg: All right, let's finish the question,
there is a question pending, and we will say we will over-
rule the objection.

Judge Bone: All right.

Judge Zirpoli: All right.

Mr. Krause: May we hear the pending question?

The Witness: Will you repeat it, please?

(Record read by the Reporter.)

A. Definitely so.

Judge Zirpoli: What, in your opinion, would you deem
communist propaganda, so we are getting your frame of
mind on this?

The Witness: Well, running down the free societies,
which they call capitalism, and making heroes out of their
partisans, or hero workers, or whatever they call them,
everything they do seems to be just the very best and
everything over here they run down, and everything they
can find bad about this country, and about the western
society, they will run down in every possible way they can.

Judge Bone: Does that convince you that this is a pretty bad lot here in the country?

[fol. 183] The Witness: No.

Judge Bone: What are you, a German or a Bulgarian—

The Witness: I am Danish.

Judge Bone: Danish?

The Witness: Yes.

Judge Bone: And you find yourself mighty perturbed, or do you?

The Witness: No.

Judge Bone: Of this indictment of the American people?

The Witness: Oh, I do not—

Judge Bone: Why are you so disturbed by what some fellow in Bulgaria has to say about the people of the United States and the culture of this country?

The Witness: It does not disturb me, sir.

Judge Bone: It disturbs you. You think you are—

The Witness: It does not, sir.

Judge Bone: Are you appearing here in pro bono publico, to save the public from some hideous fate, or what is the idea that underlies your suit?

The Witness: As far as the suit is concerned, I wish to receive any and all mail—

Judge Bone: Oh, yes, but there are a hundred and eighty million people in the United States that may have all sorts of ideas about it.

Mr. Krause: He is only one, but I think he has—

[fol. 184] Judge Bone: Oh, yes.

Judge Wollenberg: Let's not argue now; go on to another question.

Judge Bone: We don't want to argue about it, this is not a debate, but this man's state of mind, why he is appearing, apparently, pro bono publico, or does he confine it only to his own emotional reaction?

Mr. Krause: I will get into that, Your Honor.

Judge Bone: You get into that. Let's find out why the Danish gentleman is so disturbed about something that comes from Bulgaria which he desires to have, and you can explain what part Esperanto plays in it while you're at it. It might delight the Supreme Court if this case ever got up there. Go ahead and enlighten us.

The Witness: All right. Being an Esperantist, I am interested in receiving anything that is printed in Esperanto, from wherever it comes and whatever the material might be. There are quite a few people who do not know about Esperanto yet and anything I could receive from whatever source would be a proof of the utility of Esperanto, whoever prints it.

Judge Bone: Did you ever write to anyone in public life here, including federal judges, about the desirability of improving their cultural outlook by studying Esperanto?

The Witness: Personally, I did not, because I am not yet a citizen.

[fol. 185] Judge Bone: Well, then, what is the importance of Esperanto to you? Is it confined wholly to your own contemplations of life's problems? Or, if you were in a religious mood and wanted to do something for the whole world, did you ever undertake to enlighten anybody else here publicly about Esperanto?

The Witness: Yes, I do.

Judge Bone: How many?

The Witness: Oh, quite a few people, as many people as—

Judge Bone: Oh, quite a few.

The Witness: Well, anybody whom I had the opportunity to tell about Esperanto.

Judge Bone: Well, you may have an opportunity now, because you projected yourself well into the public eye. The American press can be counted on to refer to your objections here, but I didn't know there was anybody in San Francisco, and I have been on the Court, I served for twenty years, that was so interested in Esperanto that he wanted to turn himself into a sort of a messenger, imparting knowledge of Esperanto to the people.

The Witness: Yes, several.

Judge Bone: —ever dawn on you that any of us on the Bench here might be interested in Esperanto?

The Witness: Well, there are several people in [fol. 186] San Francisco who are so-called delegates for the Universal Esperanto Association, the association which their sole purpose is to distribute knowledge of and use of Esperanto throughout the world. I am just one of the delegates. The main delegate has the chief responsibility.

Judge Bone: So your position is that you must defend the right of the Communist Party of Bulgaria to introduce into this Esperanto literature a lot of stuff that may be highly obnoxious to a lot of people?

The Witness: I do not agree with that statement. It is not a matter of induce a lot of people. Anybody can use any language, so print anything they want, and it is any individual person's right and liberty in the United States, according to the Constitution, to receive any literature that comes from abroad as long as it is not directly against the other laws, as my counsel has already pointed out earlier in the session, and that is why I object to having my mail censored, and furthermore, as my counsel objects, as far as——

Judge Bone: Do you object to the Police Department's keeping a record of men of questionable character in the field of crime?

The Witness: No, sir; not at all.

Judge Bone: You don't?

The Witness: No. I do not consider this case——

Judge Bone: You don't consider that an invasion of [fol. 187] their constitutional rights?

The Witness: No. Not if they are criminals.

Judge Bone: Not to be molested by having their name on some police file.

The Witness: Not if they are criminals.

Judge Bone: No one has suggested that you are a criminal; we are talking about a postal regulation of the country. But you realize the implications of this business, that no federal agency can ask any questions about what a man is getting, so long as they don't put you in jail or harm you in any way?

The Witness: Oh, that doesn't mean much.

Judge Bone: It may not mean much to a Dane who has introduced himself into the country, but it means a great deal to those of us born in the United States.

The Witness: Yes, Your Honor, but there is a difference——

Judge Bone: I don't want to go to Denmark to get my conception of American life, if you understand.

The Witness: All right, Your Honor, but there is a difference, however, in being a criminal and being wracked

down in the mud by certain congressional committees, who do not always use fact, but innuendo to destroy your name.

Judge Bone: Oh, yes, I know, I have served in Congress a great many years, I am quite familiar with the burden [fol. 188] they have to bear in the face of animadversions directed at them. Do you know that few men live a more rugged life than Members of Congress? They are accused of everything under the sun.

The Witness: I am quite aware of that, sir.

Judge Bone: They develop thick hides; there is more said about them than is said about you.

The Witness: I am srre of that.

Judge Bone: Yes. Now, when I say, said about them, I mean bitter criticism.

The Witness: I understand that, sir.

Judge Bone: Yes.

Judge Wollenberg: May I suggest, if there is no further—

Mr. Krause: Yes, Your Honor, I am ready to go on.

Q. Mr. Heilberg, you said you are a citizen of Denmark. Are you considering applying for citizenship in the United States of America?

A. Yes.

Q. Now, I want to show you something I have shown to counsel that is marked Plaintiff's Exhibit 1 for identification, and ask you whether you have seen that before? I will describe it as an envelope containing a card.

A. Yes, I have seen such a thing before; yes.

Q. Where did you see that?

A. I received this in the mail.

[fol. 189] Q. What did you do with it after you received it in the mail?

A. I gave it to you.

Q. Does this card indicate that the post office is holding a publication for you?

A. That's correct.

Mr. Collett: If the Court please, the card speaks for itself.

Judge Bone: Same ruling.

Judge Wollenberg: You want it marked?

Mr. Krause: The envelope has been marked, Your Hon—

or. I would like to offer this in evidence. It's the same form as we have alleged in our complaint.

Judge Wollenberg: May I see the envelope?

Mr. Krause: Yes.

Judge Wollenberg: When did you receive this in the mail, in June? It bears a postage stamp, June or July, it is Jun 12, 1963. Is that about the time you received it?

The Witness: A few months ago, that is correct.

Judge Wollenberg: So this was prior to the time that you filed the suit?

Mr. Krause: This particular card was the reason for the suit.

Judge Zirpoli: This is the card upon which the whole case is predicated, is it not?

[fol. 190] Mr. Krause: That is right.

Judge Zirpoli: Is that it?

Mr. Krause: Not the whole case, Your Honor, but the temporary injunction—

Judge Zirpoli: If you had never received* this card, there never would have been a lawsuit?

Mr. Krause: Yes, that is correct.

Judge Zirpoli: All right.

Judge Bone: All right. This came airmail, mailed at San Francisco?

Mr. Krause: The post office sends all those airmail in the same city.

Judge Wollenberg: Airmail.

Judge Bone: Yes; they use airmail to deliver mail in San Francisco?

Mr. Krause: That's right. That is the way it is marked.

Judge Bone: Just what sort of a plane is this airmail carried on? That's news to me; I fly airplanes all the time.

Mr. Krause: Is the envelope and the card then in evidence?

Judge Zirpoli: Yes.

Judge Wollenberg: Yes, mark it in evidence; agreeable with you?

Judge Bone: Yes.

[fol. 191] Judge Wollenberg: Mark it in evidence, whatever the number is.

Judge Bone: Introduce all of it, in case it goes to the

Supreme Court, if you are energetic enough to take it there.

The Clerk: Plaintiff's Exhibit 1 admitted and filed in evidence.

(Plaintiff's Exhibit 1, previously marked for identification, was admitted into evidence.)

Judge Wollenberg: To get back, did you want to do anything with these, too? (Indicating.)

Mr. Krause: I will offer those in evidence in just a minute, Your Honor.

Judge Wollenberg: All right.

(Colloquy among the Court out of the hearing of the Reporter.)

Judge Bone: You have more questions?

Mr. Krause: Yes.

Judge Zirpoli: I would like to ask you a couple of questions. After you got this letter, Mr. Heilberg—

The Witness: Yes, sir.

Judge Zirpoli: —you brought it to the office of the American Civil Liberties Union, did you?

The Witness: That's correct.

Judge Zirpoli: All right. And you talked with their lawyers?

[fol. 192] The Witness: Yes.

Judge Zirpoli: All right. And then this suit was instituted?

The Witness: Yes.

Judge Zirpoli: Did you advance any costs or any fees of any kind or character whatsoever?

Mr. Krause: I would like to know what the relevance is?

Judge Zirpoli: Well, the relevancy is that of a question of hardship and there has been an allegation here about spending fees—that you had to spend filing fees and the like. Now, I am interested in knowing: Did you advance one dollar?

The Witness: To the—

Judge Zirpoli: Yes.

The Witness: —to the ACLU?

Judge Zirpoli: Yes.

The Witness: Oh, yes, I paid this year, I paid them a

couple of times, I paid them money. I don't know—it was not—

Judge Zirpoli: You paid dues, or did you pay any money for this case?

The Witness: Well, not directly for the case; I paid dues, and I paid besides that about, I paid support to the organization, but not with the stipulation that it be directly [fol. 193] used for the case.

Mr. Krause: I will stipulate, Your Honor, that the American Civil Liberties Union has advanced the money for the filing fee and Mr. Heilberg is not required to—

Judge Zirpoli: So this litigation, as litigation, does not cost him a five-cent piece?

Mr. Krause: It does not cost him any money.

Judge Zirpoli: All right.

Mr. Krause: However, it will cost the next guy some money.

Judge Zirpoli: Well, you may argue that at the proper time, I was just asking the question.

Mr. Krause:

Q. I want to show you a card marked as Plaintiff's Exhibit 2 for identification and ask you whether you have ever seen that?

A. Oh, yes.

Q. Where did you see that?

A. This, I received in the mail.

Q. Did you receive it just as it is, without that little identifying tag on it?

A. Without this identifying tag, yes.

Q. What is that?

A. That is just like the other one, but it is—was sent wrongly to my address instead of being sent to New York.

Q. What is the address on it?

[fol. 194] A. Robert K. Christenberry, New York, New York, 10001.

Q. Now what does it say on the other side?

A. Instructions to deliver this publication and similar publications, and with my name and address underneath.

Q. Your name and address is on that card and it is checked to deliver this publication and similar publications?

A. That is correct.

Q. Now, did you fill out that card?

A. No.

Q. Did you instruct anyone to fill out that card?

A. No.

Q. Had you ever seen that card before it came to your mailbox?

A. No.

Q. When it came to your mailbox, it was already filled out?

A. That's correct.

Mr. Krause: I would like to offer this in evidence as Plaintiff's Exhibit next in order.

Mr. Collett: Well, let's have a little more foundation on this as to the time as related to the first one here.

Judge Bone: You have more exhibits?

Mr. Krause: Yes; those exhibits, the magazines which we discussed.

Judge Wollenberg: We'd better rule on this first. I don't know whether Mr. Collett has an objection or not; [fol. 195] I didn't understand his remarks.

Mr. Collett: The card has been, to an extent, identified, but I would like to object that a complete foundation hasn't been laid as to the time that it was received and where he received it.

Judge Wollenberg: All right.

Judge Bone: Do you have to introduce all of them, or are some of them exemplars of the general tenor?

Judge Wollenberg: There is only one.

Mr. Krause: This is the last thing I am introducing besides those magazines.

Judge Bone: All right.

Mr. Krause: And I offer this in evidence.

Judge Wollenberg: Can you fix about what date it is, is there a mark on it?

Mr. Krause: Yes.

Judge Wollenberg: Then answer Mr. Collett's question.

Mr. Krause:

Q. Is there a postmark on it, Mr. Heilberg?

A. Yes, sir, there is.

Judge Wollenberg: About when did you receive it?
The Witness: Washington, D. C., 12-M 16 September 1963.

Mr. Krause:

Q. Did you receive it in September of 1963?

A. I believe so, three or four months ago, something like that.

[fol. 196] Q. What was that last answer, you believed you received it?

A. I know I received it, but I cannot recall the exact date at this time.

Judge Wollenberg: All right, it may be marked, Mr. Clerk, as next in order. Agreed?

Judge Bone: Yes.

Judge Wollenberg: All right.

The Clerk: Plaintiff's Exhibit 2 admitted and filed in evidence.

(Plaintiff's Exhibit 2, previously marked for identification, was admitted into evidence.)

Mr. Krause:

Q. Now, these two packages containing magazines, Mr. Heilberg—

A. Yes.

Q. —did they come sealed or unsealed?

A. The one came sealed, the other unsealed; the big one unsealed.

Mr. Krause: I would like to offer these as the Plaintiff's next in order, 3 and 4.

Mr. Collett: Well, let's have a look at them.

Judge Zirpoli: When you say "sealed," when you received it, it was sealed?

The Witness: It was sealed, yes, the one.

Judge Zirpoli: All right.

Judge Wollenberg: The one with no description of any [fol. 197] kind on the envelope except the address of the sender and the name?

Mr. Krause: That one was sealed.

Judge Wollenberg: That one was sealed.

Judge Bone: You might tell us how that would stigmatize you when there is nothing on the envelope to inform your neighbors that there was something—

Judge Wollenberg: Nothing on either of them. Let's get the exhibits in.

Judge Bone: Put them in, they are admitted.

The Clerk: Plaintiff's Exhibits 3 and 4 admitted and filed in evidence.

(Plaintiff's Exhibits 3 and 4, referred to above, admitted into evidence.)

Mr. Krause:

Q. Mr. Heilberg, do you recall being in court on another occasion for this lawsuit where we were in the court room of Judge Burke?

A. Yes.

Q. Do you recall then being handed a package by Mr. Elmer Collett?

A. Yes. At that time, I did not know this gentleman had any connection with the post office.

Mr. Collett: Objection. Just answer the question, whether he remembers.

The Witness: Yes.

[fol. 198] Mr. Collett: Move the rest of it be stricken.

Mr. Wollenberg: He said yes. The balance may go out.

Mr. Krause:

Q. Now, did you know that this package he was handing you contained a piece of mail with which you were concerned in filing this lawsuit to receive?

A. No.

Judge Bone: How did you know that?

The Witness: I said, no.


Mr. Wollenberger: He said he did not know.

The Witness: Did not know.

Judge Bone: Oh, you did not know.

The Witness: I did not know.

Judge Bone: All right.



Mr. Krause:

Q. Now, what happened to that package after it was handed to you?

A. I gave it to you.

Q. Did you mean to accept delivery of this piece of mail as a delivery in the regular course of post?

Mr. Collett: Well, I object, if the Court please, calling for—

Judge Bone: Well, I think that is probably irrelevant. If I wrote you a letter, would you refuse to receive it in the mail?

The Witness: Not in the mail, no.

Mr. Krause:

Q. Let me ask you this—

[fol. 199] Judge Bone: Now what was the tender of the piece of mail by Mr. Collett; that was regarded as something suspicious by you?

The Witness: May I explain that?

Judge Bone: Yes.

The Witness: As I said before, I did not know who this gentleman was, and without a word, just come, stuck it in my hand, I didn't know what it was, and so immediately my counsel told me to hand it over to him, because I don't know who the gentleman is, I don't know what the package is that he sticks in my hand, and he didn't say—

Judge Bone: It didn't look dangerous, did it?

The Witness: I wouldn't know what it was. In any case, my counsel told me to—

Judge Bone: Well, was Mr. Collett appearing as counsel in the case then?

The Witness: I think so. I'm not quite sure. I cannot recall who it was. There were more than—well, two or three gentlemen all together.

Judge Zirpoli: Did you ever look at that afterwards?

The Witness: Afterwards, after I had given it over to counsel.

Judge Zirpoli: Yes, you looked at it; where did you look at it, at his office?

The Witness: In the court room.

[fol. 200] Judge Zirpoli: In the court room. All right. When you saw it in the court room, you knew it was the mail that was previously addressed to you, didn't you?

The Witness: Yes, I did.

Judge Zirpoli: All right.

Mr. Krause:

Q. You knew it was mail previously addressed to you?

A. I beg your pardon?

Q. You knew it was mail addressed to you?

A. It was addressed to me, yes.

Q. But you didn't know what was inside, did you?

A. No.

Judge Zirpoli: Am I to understand this man doesn't know to this day what was inside of it?

Mr. Krause: As a matter of fact, I am going to establish now that he has never had that piece of mail, never had it in his possession other than this mere handing of it to him.

Judge Zirpoli: Is that because counsel has never showed it to him?

Mr. Krause: I don't have that piece of mail either, Your Honor.

Mr. Krause:

Q. Where did you see that piece of mail last, Mr. Heilberg?

A. I saw it up at the counsel stand in the court room.

[fol. 201] Judge Zirpoli: As far as you are concerned, you received it and after you received it you turned it over to the lawyer; is that right? Isn't that what happened?

The Witness: I received something in my hand which I turned over to my lawyer, not knowing what it was.

Judge Zirpoli: All right.

Mr. Krause:

Q. Have you expressed any desire to have your mail delivered in the United States Court by the United States Attorney's Assistant?

A. No.

Judge Bone: Now, wait; I don't want to leave this court room with the wrong impression, but it has been suggested here, and apparently without objection, that you said you would accept the mail, wanted it, you would receive it.

Mr. Krause: No, Your Honor, I don't recall that being the testimony.

Judge Bone: Well, the record will show it. In view of what you said just now, you can be very sure that it better be in the record. I don't think my hearing has befuddled me. I think the statement was made here, he would accept the mail and he wanted to have it.

Mr. Krause: Well, let me ask Mr. Heilberg—

Judge Bone: Mr. Collett can tell me if I am entirely wrong.

Mr. Collett: In fact, you repeated it to him.

[fol. 202] Judge Bone: What is that?

Mr. Collett: In fact, you repeated it to him.

Judge Bone: That is right; I was very careful in repeating it.

Mr. Collett: This complaint alleges—

Judge Bone: The record will so show.

Mr. Collett: This complaint alleges that he desires to receive it.

Judge Wollenberg: The complaint says so.

Mr. Krause: The testimony shows that he had physical possession of this piece of mail, we concede that.

Judge Bone: I know, but we are talking about is willing to receiving the mail and wanting it, and he says so in his complaint.

Mr. Krause:

Q. Now, Mr. Heilberg, do you desire to receive any mail whatsoever after it has been processed pursuant to the terms of this statute, that is, Section 4008, after it has been labelled communist political propaganda? Do you desire to receive that mail?

A. That requires a qualified answer.

Judge Bone: Well, give us the best answer you can; I want to know.

The Witness: I want to receive everything, but I do not want it first to be labelled as communist political propa-

ganda and thus my name being on a file which after can [fol. 203] be used by anybody who gets hold of it.

Judge Zirpoli: Well, now, let me ask a question. Supposing the mail came to you and was labelled communist propaganda, you never received a card, but is labelled communist propaganda, and has got a label of the United States Post Office Department on it; would you accept it?

The Witness: Yes.

Judge Bone: Well, that's unequivocal. That was one question. Now, your counsel has asked you about the immigration laws. I want to ask something about that myself. I have some familiarity with them.

Mr. Krause: I have one more question—

Judge Bone: Go ahead.

Mr. Krause: —on this matter, and then I will turn him over to you.

Judge Bone: All right.

Mr. Krause:

Q. Mr. Heilberg, do you have any objection to your mail being delayed through the process of Section 4008?

Mr. Collett: Your Honor—

Judge Wollenberg: I think that's immaterial, whether he has an objection or not.

Mr. Collett: —object to that question as—

Judge Zirpoli: I think we ought to sustain the objection, because he is asking to base it on the statute, and he should base it on the facts.

[fol. 204] Judge Wollenberg: Base it on the facts we have here.

Mr. Krause:

Q. Mr. Heilberg, do you wish to receive your mail as promptly as possible within the operation of the Post Office Department?

A. Yes.

Q. And do you value the fact that mail is delivered promptly?

A. Yes.

Q. And is that important to you in your work?

A. Yes.

Judge Zirpoli: Now, we are talking about mail that's not first-class, unsealed mail, aren't we?

Mr. Krause: Not all unsealed; some sealed mail subject to this statute as long as it is not a letter.

Judge Zirpoli: Yes; so we are not talking about personal correspondence. What we're talking about when we get right down to it is propaganda.

Mr. Krause: Unless it is in a package or magazine.

Judge Zirpoli: But we are talking about propaganda, aren't we?

Mr. Krause: Well—

Judge Zirpoli: And your objection is to the delay that occurs in the sending of propaganda to you, isn't that right?

The Witness: That also requires a qualified answer [fol. 205] because very seldom do you find propaganda only as propaganda. It is usually hidden among cultural aspects, like ballet or music, anything else.

Judge Zirpoli: All right. Let's include, in addition to propaganda, we'll include cultural articles that relate to music and art and ballet, and you insist upon the prompt delivery of that, is that right?

The Witness: Yes, sir.

Judge Zirpoli: And by the prompt delivery of that, you mean no unreasonable delay of one day or two days or half a day?

The Witness: No unreasonable delays.

Judge Zirpoli: Yes. That you would deem an unreasonable delay, one day or two days?

The Witness: I would.

Judge Zirpoli: All right.

Mr. Krause:

Q. Do you object, Mr. Heilberg, to the Customs Service labelling certain mail as propaganda?

A. Yes.

Q. Why?

Judge Bone: I don't know. That sort of a question. Certain mail being labelled propaganda. Just what does counsel mean by that question?

Mr. Krause: I mean classified as propaganda under the

terms of this statute; when the foreign mail flows in, some of it is siphoned off and called propaganda.

[fol. 206] Judge Bone: Do you think this man's opinion—

Judge Zirpoli: Is this a strong point being urged by the plaintiff in this case? Are you really urging as one of the strong points of the screening process of the Customs Service? I would like to know—

Mr. Krause: Yes.

Judge Zirpoli: —whether this is one of the serious contentions.

Mr. Krause: I will say we don't, as Mr. Blease said, we don't object to the screening of things coming from foreign countries. We know that is done for customs duties—

Judge Zirpoli: I would like to know where his basic constitutional right is here, is it the screening process or is it, in the final analysis the only basic constitutional right about which he is complaining, in the final analysis, this list; isn't this all your case is on?

Mr. Krause: No.

Judge Zirpoli: And isn't the rest of it so much dressing?

Mr. Krause: No. The list is an important part, but the screening and the labelling is also an important part.

Judge Zirpoli: Which is the most important, or there is no most important part?

Mr. Krause: I think to Mr. Heilberg, to my client—

Judge Zirpoli: Because we are going to decide whether [fol. 207] you have a real controversy here, and whether this is moot; and that's dependent in great measure upon the degree to which it has some significance to him, the degree to which it imposes a hardship on him.

Now, this has to be real. You can't indulge in academic discussions and theoretical discussions of hardship when you ask the Court to take a matter on as a case or controversy.

Mr. Krause: Well, the injury to him flows primarily from the list, that's what he complains about, that's what he objects to.

Judge Zirpoli: Then why don't we pay attention to that which may be of some significance in the turning point in the ultimate ruling of this Court?

Mr. Krause: Well, I will, Your Honor, but I don't want

to give you the idea that I don't think that he has the right to complain about—

Judge Zirpoli: Well, I don't know, you give me the idea, with all these other extraneous matters, that you may think your case is pretty weak on something that may have some significance, I don't know.

Mr. Krause: No, I am sorry if I give you that idea, because I certainly don't think that. I think that we have a strong case that the government can screen mail for some purposes and can't screen mail for others. They can't screen mail, for instance, they couldn't examine all our mail [fol. 208] to look for evidence of criminal violations.

Judge Zirpoli: Counsel has admitted that they could prohibit it altogether, entirely, if they want.

Mr. Krause: I think they could prohibit this foreign propaganda if they wanted to, but they have not; they have screened it and they have labelled it, which is something different.

Mr. Krause:

Q. Mr. Heilberg, perhaps you could tell us why you object to having your name on a list?

A. Well, when I apply for citizenship papers, they might go back and find out that I have been wishing to receive communist literature, and that might be counted against me. They might think that it means that I have communist sympathies.

Judge Zirpoli: They could determine that by asking you a very simple question, couldn't they? They don't have to look at any list, all they have to do is to ask you to be sworn to tell the truth, and nothing but the truth, and say to you, do you desire to receive communist literature, and assuming you would tell the truth, you would say yes.

The Witness: That's correct.

Judge Zirpoli: All right. Now what's detrimental about that to you, what difference does that make?

The Witness: Because in this country for many reasons people sometimes look at people who receive communist literature as fellow-travelers.

[fol. 209] Judge Zirpoli: You say, "this country." Are

you classifying the country as a whole, are you indicting now the entire country and the people?

The Witness: I am not indicting the people, Your Honor, I am just stating that there are conditions—

Judge Zirpoli: You mean certain government officials might take this point of view, is that what you are trying to tell us?

The Witness: Perhaps; perhaps one could say that. I have been in many different countries, Your Honor, and conditions are different in different countries. Some places they would not classify political propaganda at all, you are at complete freedom to read anything you want from whatever political false idea you want to without any classification whatever. Now, this is not the case in the United States.

Judge Zirpoli: Have you studied the customs and postal regulations in other countries of the world? Do you know what the Italian Government does, for instance? Do you know what the German Government does, for instance, do you know what it does in relation to East Germany mail? Do you know these things?

The Witness: I know, Your Honor, because I personally have experience in it.

Judge Zirpoli: All right. I am amazed and pleased to see that we have finally achieved a position in which we have a real world authority before us in postal matters. [fol. 210] And now, since we have, Mr. Krause, it might be well for you to qualify him in all these respects, and establish specific facts.

Mr. Krause: Well, he is not an expert, but he has travelled and lived in—

Judge Zirpoli: Well, the whole thing is what is going on now, this is now a situation in which, instead of getting to the actual facts, maybe the Court's partly responsible, there is an exposition of too much on his personal views, which isn't the problem before us.

Mr. Krause: I am perfectly willing to cut it off. I have no further questions at this point.

Judge Bone: Now, your counsel has spoken of the immigration laws. Let's dally with that idea for a moment. Do you consider that you have committed a crime against the republic?

The Witness: No.

Judge Bone: You are sure of this?

The Witness: Sure, I'm sure.

Judge Bone: All right. You have committed no offense for which you could be indicted, prosecuted and imprisoned.

The Witness: No.

Judge Bone: Before you came to the United States, had you chalked up any kind of a criminal record in Denmark or any other place?

The Witness: No.

[fol. 211] Judge Bone: So you come to the United States—

The Witness: Yes, one difference. In Communist Bulgaria, I was arrested by the Secret Police, by the Communist Police, and deported for having spoken against the Communist Party, against the Soviet Union, against the regime—

Judge Bone: All right.

The Witness: —et cetera. So that's one place I have been—

Judge Bone: All right. Now, that would be your only so-called criminal record, if it was one?

The Witness: Right.

Judge Bone: Just how much do you know about admission to citizenship? A criminal record, and you say you do not have one, and you have not committed any crime against the laws of this country; how do you think this could be invoked against you in the citizenship application? They generally scrutinize a man's record to find out whether he has a criminal record, and you have none. Think that one over, before you answer.

The Witness: I have thought that one over, Your Honor.

Judge Bone: Yes. How much meditation did you give it?

The Witness: This is—I think this slightly irrelevant, because in this country—

Judge Bone: No, you made it relevant.

The Witness: No, Your Honor. In this country, certain political opinions could also have inference. If [fol. 212] for example, a communist or a communist sympa-

thizer came from another place and wanted to get a citizen's papers here and they found out he wanted to read that literature, and so forth and so on, and you are a sympathizer, wouldn't that be held against him?

Judge Bone: It is probably, at least.

Judge Zirpoli: May I ask: The basic question is a question of your attaching the principles of the Constitution of the United States, that's the basic requirement for citizenship?

The Witness: Right.

Judge Zirpoli: All right, now, the Court is asking you how any of these acts would adversely affect you in connection with your application; in your judgment, how would they?

The Witness: I do not know.

Judge Zirpoli: What is your fear that you have? Do you have a real fear, or is this an imagined fear, is this a theoretical fear based upon the carrying of civil right principles into the realm of theory, forgetting for the moment the practical problems of daily life?

The Witness: No, I consider it a real fear. As I say, political attitude does have some bearing, I'm sure, upon the acceptance of me as a citizen of the United States, and therefore, being on a file of people who do wish to receive communist propaganda, so-called, I think that if the F.B.I. and other agencies which might gain information from [fol. 213] the postal files, if they use it against me, they could prevent me from getting citizenship.

Judge Bone: Do you think the police of this country, the law-enforcing authorities, should wear handcuffs, so they can't inquire about anybody, and any man could come into the country and lie, if he wanted to, to leap over the immigration barriers, such as they are, is that your idea?

The Witness: No, Your Honor.

Judge Bone: Well, you said you are not a criminal, you committed no crime, you averred that very staunchly.

The Witness: That's correct.

Judge Bone: And you think that some court would deny you citizenship when you have a clean record in the criminal field?

The Witness: Yes, I believe they can still do so.

Judge Bone: Oh, you think judges who preside over immigration hearings—

Judge Zirpoli: (Interposing.) Is this a genuine fear on your part?

Judge Bone: Do you think they would rev up some spirit of opposition to you that would destroy your chances of becoming a citizen?

The Witness: It is a fear, it is not my whole objection.

Judge Bone: You don't have much faith in the American judicial system, do you?

[fol. 214] The Witness: Oh, yes, I have, very much so; that is why I am here.

Judge Bone: Oh, you have. Yet in the same breath you say the Immigration authorities, presenting your case before a judge when you seek admission to citizenship, would compel you to confront a judge who was probably prejudiced against you?

The Witness: Not prejudiced.

Judge Bone: You're making a wonderful record here of intense loyalty, very fervent loyalty to the system into which you want to introduce yourself as a citizen.

The Witness: I think that is twisting the case a little bit.

Judge Bone: No, it isn't twisting it. I asked you particularly about the judges who would be called upon to admit you to citizenship. You said they probably would have predilections, or words to that effect—

The Witness: No.

Judge Bone: I would be the last man on earth—

The Witness: Not prejudiced—

Judge Bone: —to attribute that sort of an attitude to American judges in immigration cases; that's a pretty broad indictment.

The Witness: —not prejudiced, but judging according to political convictions, perhaps.

Judge Bone: Just what political convictions would you say this court has, from your brief acquaintance with it?

[fol. 215] The Witness: Upon my political convictions, they might consider that because I want to see such literature, that I might be undesirable.

Judge Zirpoli: As what, for what purpose?

The Witness: As a person, because the Communist

Party in the United States is indicted, so they perhaps would consider that a person who wants to receive political literature from communist countries might be an undesirable alien, who they would not want to give United States citizenship.

Judge Zirpoli: Have you had a university education?

The Witness: I beg your pardon?

Judge Zirpoli: Do you have a university education?

The Witness: I have had a couple of years of university education, Your Honor.

Judge Bone: Do you know of one instance, and you correspond with people all over the world, of one instance where a man has been denied citizenship on the basis of having received some communist literature?

The Witness: I do not know—

Judge Bone: Now, you told us that you have a wide understanding of this problem—

The Witness: Yes.

Judge Bone: —before this court. Name one case, will you?

Judge Wollenberg: He said he knows none.

[fol. 216] The Witness: I said I know no case.

Judge Bone: So, with your knowledge of the American system, of the judicial system and American culture, you know of no case where a man was denied citizenship on the grounds that you presented here. It is a very illuminating picture of a man frightened about something that probably never in the world would happen.

The Witness: Probably. However, if we take the other aspect of the same case, I might be called up for an investigation by the H.U.A.C. Then what would happen—

Judge Bone: Called up by whom?

The Witness: The House Committee of the un-American Activities.

Judge Bone: Are you violently opposed to that?

The Witness: I wouldn't say violently, I would say opposed; I am not violently opposed to it.

Judge Bone: Well, that was a slip of the tongue. Are you opposed to the existence of such a committee?

The Witness: To a certain degree, yes; and to their methods in particular, very much so.

Judge Bone: Then you, sir, are animated by political

and other emotions that have to do with the American system. The Congress of the United States created that committee, didn't it?

The Witness: Yes.

[fol. 217] Judge Bone: And you don't like that.

The Witness: I do not like the committee; that doesn't mean I don't like the United States Congress.

Judge Bone: You do not like the United States Congress.

The Witness: I did not say so.

Judge Bone: But you didn't like its instrument—

The Witness: I do not like the methods—

Judge Bone: —the House un-American Committee, which Congress created.

The Witness: Ah, there are individuals who happen to be at the top of this same committee who use methods which are not very factual. This is a process—

Judge Bone: Are you an expert in the effectiveness of the laws of the land?

The Witness: It's not an effectiveness of the laws; no people has been put under indictment, but the way people have been smeared by the committee by being questioned in certain manners, which there is history of, that I would not like to be personally—

Judge Bone: Oh, yes, I have so much of that, that it almost makes me dizzy to run across any further comments on it.

The Witness: All right, I shall not make any further comments.

Judge Bone: We might smear prosecuting attorneys for prosecuting men of ill will who annoy women on the streets.

[fol. 218] There may be a lot of people don't like that, they think the fellow should be allowed to annoy women, and even beat them up.

The Witness: That's not the case, Your Honor. We are not talking about that.

Judge Bone: All right.

Judge Zirpoli: Mr. Heilberg, I still want to get to this question—

The Witness: Yes, sir.

Judge Zirpoli: —presumably your fear, or some of

the factors involved in this case, and I find it most difficult, I must say to you most frankly, I find it most difficult to believe that you have a genuine fear that your name on this list would jeopardize your application for citizenship. I find this difficult. I have a feeling that this makes for a proper argument, but it's not a genuine fear that you feel, that's the whole thing. I'm not convinced you have this fear.

The Witness: Well——

Mr. Krause: Is there any other question you could ask him to make sure?

Judge Zirpoli: Well, you know that citizenship is given to you by the courts, do you not?

The Witness: Yes.

Judge Zirpoli: Do you know you have a right of review by the court, do you?

The Witness: Yes, Your Honor.

[fol. 219] Judge Zirpoli: And so you have a genuine fear that a court will deny you citizenship because your name was placed upon a list of persons receiving communist propaganda. That's right, that's your position?

The Witness: That might have some bearing on it.

Mr. Krause: Your Honor, may I say this, that I hate to see it look like Mr. Heilberg doesn't believe in the justice of the American courts. As he said, he has brought this case in for a ruling of the American courts. However, in citizenship cases, a recommendation is made by the Immigration and Naturalization Service, and, regardless of what the court does with that recommendation, it can be harmful to a person to have an adverse recommendation.

Judge Zirpoli: Do you know of any adverse recommendations, Mr. Krause? You have had a lot of these citizenship cases, based upon someone's name being on that list?

Mr. Krause: I know of a recommendation based on much flimsier——

Judge Zirpoli: I didn't ask you that question, Mr. Krause. Do you know of a single situation based upon someone's name being on a list?

Mr. Krause: No. Oh, on a list? Yes.

Judge Zirpoli: On a postal list, to start.

Mr. Krause: On this particular list that we are talking about in this case?

[fol. 220] Judge Zirpoli: No.

Mr. Krause: No, but if you want my prediction, I think it will happen, and if Mr. Heilberg would ask me about it, I would advise him that way. He hasn't asked me so far.

Judge Zirpoli: Do you think predictions and speculations on future possibilities constitute a basis for a court declaring an Act of Congress unconstitutional?

Mr. Krause: I think Mr. Heilberg has shown you the deterrent effect of this labelling of mail and the fact that his name is on a list. Whether Mr. Heilberg would be granted or denied citizenship, I think, is not really relevant here. What is relevant is that Mr. Heilberg—

Judge Zirpoli: I agree with you, but I am trying to determine in my own mind whether this is sincere and genuine, or whether this is just a concept of the imagination for the purpose of bolstering a case that now appears to be moot, and which the harm originally claimed no longer exists. That's what I am worrying about.

Mr. Krause: Your Honor, I have had people come into my office and said that they are applying for citizenship, and they are afraid to subscribe to the Nation magazine or the New Republic, or anything else that is in any way not the same as the San Francisco Chronicle or the Examiner or the Call-Bulletin in its political outlook. In other words, there is a real fear among people applying for [fol. 221] citizenship that some derogatory information will be developed, and this isn't something that can be said to be theoretical, this is something that can be said to be real, and if this program continues in its operation, in my experience there are going to be people deterred from receiving communist political propaganda because of the fact that a listing might be used against them, and on the merits we are going to present evidence that those people exist, people who had not only not sent in a card, they would not file suit either; they would not receive this political propaganda because they would be afraid it would be used against them.

Now, if we can show that injury, and we think we can, and the government is acting unconstitutionally, a question which they are afraid to face, because they tried to moot this case, then I think we have a good cause of action, and I think we should win this case because I think it's a

First Amendment freedom not to be deterred in your reading.

Judge Bone: Do you know of a single case that you could identify where a man was denied citizenship by a court because he read the New Republic?

Mr. Krause: I know of a case where a recommendation was made against a man because he had subscribed to the Nation magazine.

Judge Zirpoli: That was only one of probably ten or fifteen facts that went up to make the full story, that wasn't the whole story.

[fol. 222] Mr. Krause: That was one of the relevant facts, Your Honor.

Judge Zirpoli: One of many.

Mr. Krause: And another relevant fact—

Judge Zirpoli: So it took considerably more than that for such a recommendation, didn't it?

Mr. Krause: And it wasn't accepted either.

Judge Zirpoli: It was not accepted by the Court?

Mr. Krause: That is right.

Judge Bone: For many years, I read both those magazines, and no one tried to have me impeached or kicked out of office, and I was in some comparatively respectable offices. You have made the first suggestion that a fellow might be in serious trouble for reading the Nation and the New Republic. I read both of them for years.

Mr. Krause: I was quite surprised when I heard it from an immigration officer.

Judge Bone: How would you classify my taste in literature, as endangering me as a judge?

Mr. Krause: Well, I'd better say that—

Judge Bone: Yes. Well, be—

Mr. Krause: I'd better hold off on that question.

Judge Bone: Well, be frank and be brave—

Mr. Krause: I don't think—

Judge Bone: You're tilting lances in this field of [fol. 223] civil rights.

Mr. Krause: I don't think the Nation or the New Republic is going to harm you or anyone else; I don't think reading the Peking Review or Pravda or any other communist political propaganda is going to harm anyone. Anyone that takes the trouble to read that dry stuff, like

Pravda or the Peking Review, is of a certain intelligence, so he is not going to be influenced by it unless he is already very partial to it, and that's not going to make any difference. So I am outraged that the government would take it upon itself to try to tell the U. S. citizen what is or what is not propaganda.

Judge Bone: Anything further?

Mr. Krause: No, Your Honor.

Judge Bone: Now, when we leave this case today, we are going to leave it suspended in air for a while, subject to call of counsel to appear again.

Judge Wollenberg: I think you're ready to submit the motion, are you not?

Judge Zirpoli: Are both sides in agreement that everything that has to go into this record on the motion to dismiss is now in the record?

Mr. Krause: Yes, Your Honor.

Mr. Collett: If the Court please, I might ask one question: Whether I have to take the stand and recite what happened down in Judge Burke's Court in the presentation [fol. 224] of the document which I identified—

Judge Wollenberg: Your affidavit is on file.

Mr. Collett: My affidavit is on file.

Judge Wollenberg: And you stand on that affidavit, do you not?

Judge Zirpoli: We can evaluate that.

Mr. Collett: Yes, sir.

Judge Wollenberg: You stand on your affidavit?

Mr. Collett: Yes, sir.

Judge Wollenberg: You don't wish to correct that in any way?

Mr. Collett: No.

Judge Wollenberg: All right, then, I think your evidence is in the record.

Mr. Krause: May we submit the transcript of the proceedings before Judge Burke?

Judge Zirpoli: How long would it take you to do it?

Mr. Krause: It will take me a very short time to request it.

Judge Wollenberg: That's what I mean, you haven't inquired of the Reporter how long it will take?

Mr. Krause: No. It is only about a half hour.

Judge Wollenberg: That's all right, certainly.

Mr. Krause: We will submit that as soon as we can.

Judge Wollenberg: As soon as you can get it.

[fol. 225] Judge Bone: Well, we will stand—

Mr. Collett: May I ask one question of Mr. Heilberg?

Judge Wollenberg: Pardon me, I didn't realize.

Mr. Collett: Excuse me, Your Honor.

Cross-examination.

By Mr. Collett:

Q. With regard to any potential, probable or otherwise, application for citizenship, if you were asked questions with regard to whether or not you received communist propaganda, you would tell the truth that you did, would you not?

A. Naturally.

Q. And you don't expect to conceal anything in the course of your application, do you? You don't expect that the presence of your name on any list is going to reveal something that you won't otherwise reveal in the course of any interrogation that may be conducted during the process by which you finally appear before a court, is that correct?

A. Yes.

Mr. Collett: That's all.

Judge Bone: This Court will stand at recess subject to further call.

Judge Wollenberg: All right, and the motion is submitted.

Judge Bone: Yes, the motion to dismiss is submitted.

[fol. 225a] IN UNITED STATES DISTRICT COURT, NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

PLAINTIFF'S EXHIBIT No. 1

No. 41660

Filed January 2, 1964, James P. Welch, Clerk.

By [Copy Illegible], Deputy Clerk.

UNITED STATES POST OFFICE
FOREIGN PROPAGANDA UNIT
STATION B - CUSTOMS HOUSE
~~SAN FRANCISCO 26, CALIF.~~
OFFICIAL BUSINESS

P-433

PENALTY FOR PRIVATE USE TO AVOID
PAYMENT OF ADD'L. 1305
JUL 12 5 30 PM '63
VIA AIR MAIL

~~XXXXXXXXXXXX~~

2896**DELIVER**☐ THIS PUBLICATION☐ SIMILAR PUBLICATION**INSTRUCTIONS**Aug. 2, 1963

(Date)

DO NOT DELIVER☐ THIS PUBLICATION☐ SIMILAR PUBLICATION

"A Proposal Concerning The General
Line of The International Communist
Movement" 1963, 1 copy

Leif Heilberg
1801 Page Street
San Francisco 17, Calif.

POD Form 2153-X, Jan. 1963

MESSAGE TO ADDRESSEE

This office is holding unsealed mail matter addressed to you from a foreign country. Under Public Law 87-783, the Secretary of the Treasury has determined this mail to be Communist political propaganda. It cannot be delivered to you unless you have subscribed to it, or otherwise want it. Please check the appropriate spaces under "Instructions" on this card and return the card. If your reply is not received by the date indicated, it will be assumed that you do not want to receive the publication(s) listed, or any similar publication. This mail will then be destroyed.

(Detach Here)

Postmaster

[fol. 225c]

POST OFFICE DEPARTMENT

OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID
PAYMENT OF POSTAGE, \$300

VIA AIR MAIL

Postmaster

**FOREIGN PROPAGANDA UNIT
STATION B - CUSTOMS HOUSE
SAN FRANCISCO 26, CALIF.**

(City and State)

[fol. 225d] IN UNITED STATES DISTRICT COURT, NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

PLAINTIFF'S EXHIBIT No. 2

No. 41660

Filed January 2, 1964, James P. Welsh, Clerk.

By [Copy Illegible], Deputy Clerk.

INSTRUCTIONS

(Date)

DELIVER

DO NOT DELIVER

- ☒ THIS PUBLICATION
☒ SIMILAR PUBLICATION

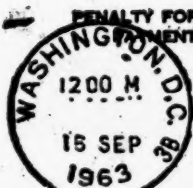
- ☐ THIS PUBLICATION
☐ SIMILAR PUBLICATION

Leif Heilberg
1801 Page Street
San Francisco, California

[fol. 225e]

POST OFFICE DEPARTMENT

OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID
FORFEITMENT OF POSTAGE \$300**"ABCD" MAIL**
BETTER BUSINESS \$**Postmaster Robert K. Christenberry****New York, New York 10001****(City and State)**

[fol. 226]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41660

[Title omitted]

ORDER DENYING MOTION TO DISMISS—January 10, 1964

Based upon the record presently before it, the Court cannot say that the case is moot, nor that it fails to present a true controversy and a substantial question of constitutional law.

It Is Therefore Ordered that the Motion to Dismiss is hereby denied.

Dated: January 10, 1964.

Homer T. Bone, United States Circuit Judge, Albert
C. Wollenberg, United States District Judge, Al-
fonso J. Zirpoli, United States District Judge.

Copies to counsel and judges 1/16/64.

[fol. 227]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

DEFENDANTS' ANSWER TO COMPLAINT—Filed January 24,
1964

Now come the defendants, by their attorneys, Cecil F. Poole, United States Attorney, and Charles Elmer Collett, Assistant United States Attorney, and in answer to the complaint filed herein by plaintiff Heilberg, say:

First Defense

1. The defendants deny the allegations contained in paragraph 1 of the complaint.

2. The defendants deny the allegations contained in paragraph 2 of the complaint.

3. Answering paragraph 3 of the complaint, the defendants admit that they are charged with the enforcement of the provisions of 39 U.S.C. Section 4008, but deny that said statute is unconstitutional.

4. Defendants admit the allegations contained in paragraph 4 of the complaint.

[fol. 228] 5. Answering paragraph 5 of the complaint, the defendants state they have no knowledge whether plaintiff ordered the unsealed mail matter in question, but that upon his statement that he desired to receive such unsealed mail matter, it was delivered to him. The defendants further allege that all such unsealed mail matter will be delivered to him in the future without further inquiry.

6. Answering paragraph 6 of the complaint, the defendants admit that an index is maintained of persons who indicate on POD Form 2153-X, January, 1963, that they desire to receive delivery of unsealed mail matter determined to be Communist political propaganda addressed to them. Defendants allege that this index is maintained solely as a convenience to facilitate the expeditious delivery of such mail without repeatedly requesting the addressees to signify willingness or unwillingness to accept such unsealed mail matter addressed to them. Defendants allege that instructions have been issued prohibiting release of said names, except with the express permission of the Post Office Department in Washington. (See Affidavit of Tyler Abell, Associate General Counsel, Post Office Department, attached hereto and marked defendants' Exhibit A.) The remaining allegations of paragraph 6 are conjectural and speculative. Defendants deny that any adverse inference may properly be drawn from inclusion of a name on such index.

7. Answering paragraph 7 of the complaint, the defendants admit that the use of said index is not restricted by law, and allege the names will be disclosed only by the express permission of the Post Office Department. Defendants otherwise deny the factual allegations of paragraph 7.

8. The defendants deny the allegations contained in paragraph 8 of the complaint and allege that the defendants have already delivered said unsealed mail matter to the plaintiff.

[fol. 229] (On October 29, 1963 an order was entered dismissing the complaint filed by the plaintiff Krause. Accordingly, no answer is required as to paragraphs 9 through 15, inclusive, of the complaint.)

9. Answering paragraph 16 of the complaint, the defendants deny that 39 U.S.C. Section 4008 is unconstitutional on its face. Non-preferential unsealed mail is not accorded the privilege of secrecy given first class mail. Moreover the statute is designed to permit the non-delivery of large quantities of unsealed mail matter determined to be Communist political propaganda which most people do not want to receive and which they should not be required to receive against their wishes.

The defendants further deny that the statute violates plaintiff's right to freedom of speech, press, or association and privacy or in any manner infringes his constitutional rights under the First Amendment to the Constitution of the United States. No person is ever precluded from receiving such unsealed mail matter and making his own decision as to whether or not, in his opinion, it is Communist political propaganda.

The defendants further deny that the statute deprives plaintiff of due process of law under the Fifth Amendment to the Constitution of the United States. The exemption of certain groups permitted to receive such unsealed mail matter without inquiry were included in the law, not because these groups are better able to discern propaganda, but because Congress recognizes that such groups would obviously desire to receive this type of unsealed mail matter and, therefore, there was no necessity to inquire of their desires.

Moreover the standards for determining what constitutes "Communist political propaganda" are neither vague nor uncertain, nor do they fail to provide the opportunity for notice or hearing. On the contrary, in defining [fol. 230] Communist political propaganda for the purposes of 39 U.S.C. Section 4008, Congress incorporated

the definition contained in the Foreign Agents Registration Act, 22 U.S.C. Section 611, which has been in effect for many years.

10. Answering paragraph 17 of the complaint, the defendants deny that the material entitled "A Proposal Concerning the General Line of the International Communist Movement" is now in possession of the defendant Fixa as said material has been delivered to the plaintiff. Defendants furthermore deny that an order is needed restraining them from detaining plaintiff's unsealed mail matter, since instructions have already been issued that all such unsealed mail matter addressed to him be not detained. (See affidavit of Louis J. Doyle, General Counsel, Post Office Department, heretofore filed.)

11. The defendants deny each and every allegation in the complaint not expressly admitted, denied, or otherwise qualified herein.

Second Defense

The complaint fails to state a claim upon which relief may be granted.

Third Defense

There is no legal basis or justification for the Court to restrain the defendants from enforcement, operation, or execution of 39 U.S.C. Section 4008; as defendants are not charged with having failed to deliver any unsealed mail matter addressed to the plaintiff which he desires to receive.

Fourth Defense

The complaint fails to state a justiciable issue concerning any interest of the plaintiff remaining to be adjudicated by the Court.

[fol. 231]

Fifth Defense

The Court lacks jurisdiction over the subject matter of the complaint as no substantial question is presented.

Wherefore, the defendants, having fully answered the allegations contained in the numbered paragraphs of the

complaint of the plaintiff, pray that the complaint herein be dismissed, with costs taxed against the plaintiff.

Dated: January 24, 1964.

Cecil F. Poole, United States Attorney. /s/ Charles
Elmer Collett, Assistant United States Attorney,
Attorneys for Defendants.

CERTIFICATE OF SERVICE BY MAIL (omitted in printing.)

[fol. 232] EXHIBIT A TO DEFENDANTS' ANSWER

TYLER ABELL, ASSOCIATE GENERAL COUNSEL
Post Office Department

I, Tyler Abell, do hereby swear to the following facts:

1. The administration of § 305 of Public Law 87-793 was under my control during the first part of 1963 when I held the position of Special Assistant to the Postmaster General. In this capacity I arranged for the establishment of all the now existing Foreign Propaganda Units, and gave oral, as well as written, instructions to the Foreign Propaganda Units.

2. One of the points covered in the establishment of each Propaganda Unit was an instruction that the file kept on addressees to whom propaganda had been sent would not be made public and that no part of this file could be released to any person, U. S. government agency or other group, except with express permission from Post Office Department headquarters in Washington.

3. Although my position changed from that of Special Assistant to the Postmaster General to Associate General Counsel in May, 1963, I have continued to oversee the Communist propaganda program. There have been no requests from any of the field offices for permission to release

the above mentioned files, nor have any instructions been given from Washington.

Tyler Abell, Associate General Counsel.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Sworn to before me this 13th day of December, 1963.
Lawrence B. Gowen, My Commission expires April 30,
1966.

[fol. 233] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

No. 41660

AMENDMENT TO COMPLAINT AND NOTICE OF MOTION—Filed
April 14, 1964

To the above-named defendants and their attorneys:

Please Take Notice that on April 23, 1964 at 10 A.M. in Room 244 of the Post Office Building, San Francisco, California, plaintiff by his attorneys will move the Court to allow the amendment of his pleading in the following respects.

1. Where ever the name "J. Edward Day" appears in said pleading, substitute the name of his successor in office, John A. Gronouski.

2. Add to paragraph XVI of said pleading, the following: "4. It violates plaintiff's right to be free of unreasonable searches and seizures in his papers and effects as [fol. 234] guaranteed by the Fourth Amendment to the Constitution of the United States of America."

Date: April 13, 1964.

Marshall W. Krause, Coleman Blease.

Order

Pursuant to Rules 25(d) and 15(a) of the Federal Rules of Civil Procedure, plaintiff's complaint is ordered amended as set forth above.

Date: —.

—, —, United States Circuit Judge, —, —,
United States District Judge, —, —, United
States District Judge.

CERTIFICATE OF SERVICE (omitted in printing.)

[fol. 235]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41660

[Title omitted]

INTERROGATORIES TO DEFENDANT JOHN F. FIXA—Filed April
20, 1964

Please answer separately and fully the following interrogatories under oath as provided in Federal Rule of Civil Procedure 33:

1. Is the statement of Tyler Abell, Associate General Counsel of the Post Office Department, appended to plaintiff's Points and Authorities in opposition to Motion to Dismiss as Appendix III, accurate as to the current practice and division of responsibilities of the Post Office Department and the Treasury Department on the administration of 39 U.S.C. § 4008?

2. If not, please state in what particulars the current practice and division of responsibilities differ.

3. What countries are currently determined to be within the purview of 39 U.S.C. § 4008 (b)?

4. Is the mail of any country which is currently determined to be within the purview of 39 U.S.C. § 4008 (b) *not* being screened pursuant to the administration of 39 U.S.C. § 4008? If so, which countries?

[fol. 236] 5. Approximately how many pieces of mail were received by the propaganda screening unit in San Francisco in 1963 and in the months of January and February, 1964.

6. Approximately what percentage of said mail was determined to be:

- (a) Exempt mail
- (b) propaganda

7. How many persons are employed in the propaganda screening unit in San Francisco by:

- (a) The Post Office Department
- (b) The Treasury Department.

8. With respect to the persons referred to in question 7, state their names, the Department for which they work, their functions with respect to the administration of the screening program and their language specialties.

9. How is it determined whether mail matter has been ordered by subscription?

10. Approximately how many pieces of mail were destroyed by the San Francisco screening unit during 1963 and during the months of January and February, 1964, as not desired by the addressee?

Date: April 3, 1964.

/s/ Marshall W. Krause, Attorney for Plaintiff.

ACKNOWLEDGEMENT OF SERVICE (omitted in printing.)

[fol. 237] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41660

[Title omitted]

INTERROGATORIES TO DEFENDANT GEORGE BROKAW—Filed
April 20, 1964

Please answer separately and fully the following interrogatories under oath as provided in Federal Rule of Civil Procedure 33:

1. Is the statement of Tyler Abell, Associate General Counsel of the Post Office Department, appended to plaintiff's Points and Authorities in opposition to Motion to Dismiss as Appendix III, accurate as to the current practice and division of responsibilities of the Post Office Department and The Treasury Department on the administration of 39 U.S.C. § 4008?

2. If not, please state in what particulars the current practice and divisions of responsibilities differ.

3. What countries are currently determined to be within the purview of 39 U.S.C. § 4008(b)?

[fol. 238] 4. Is the mail of any country which is currently determined to be within the purview of 39 U.S.C. § 4008(b) not being screened pursuant to the administration of 39 U.S.C. § 4008? If so, which countries?

5. Approximately how many pieces of mail were received by the propaganda screening unit in San Francisco in 1963 and in the months of January and February, 1964?

6. Approximately what percentage of said mail was determined to be:

(a) exempt mail

(b) propaganda?

7. How many persons are employed in the propaganda screening unit in San Francisco by:

(a) The Post Office Department

(b) The Treasury Department?

8. With respect to the persons referred to in question 7, state their names, the Department for which they work, their functions with respect to the administration of the screening program; and their language specialties.

9. With respect to that mail matter which is examined to determine whether it is "Communist political propaganda" within the meaning of 39 U.S.C. 4008:

- (a) Is each piece which is examined, opened and read?
- (b) If not, then how is the determination of classification arrived at?

10. What training is given those employees charged with the responsibility of determining whether mail is "Communist political propaganda"? In answering this question, please state:

- (a) How many hours are devoted to such training?
- (b) Who supervises the training?
- (c) What written and oral instructions are given regarding the standards to be applied?
- (d) What training materials are used. Include the name and description of any mail matter which is used as a sample or guide of matter properly classified as "Communist political propaganda."

[fol. 239] 11. State the names of twenty publications which are representative of mail which has been determined by the San Francisco screening unit to be "Communist political propaganda."

Date: April 3, 1964.

/s/ Marshall W. Krause, Attorney for Plaintiff.

ACKNOWLEDGEMENT OF SERVICE (omitted in printing.)

[fol. 240]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

ORDER GRANTING MOTION TO AMEND COMPLAINT, OVERRULING
OBJECTIONS TO INTERROGATORIES, FIXING DATE FOR PRE-
TRIAL AND DATE FOR TRIAL—April 28, 1964

The Court has before it plaintiff's motion to amend the complaint and defendants' objections to interrogatories.

The motion to amend the complaint is granted.

The objections to the interrogatories addressed to the defendants John F. Fixa and George Brokaw are overruled, and said defendants are directed to answer each of the same, within fifteen days from the date of filing of this Order, unless it is claimed that the answer to any question will jeopardize or otherwise affect the national security or foreign policy of the United States. All such claimed exceptions shall be submitted to the Court in writing with a statement of the reason therefor.

[fol. 241] This matter is continued to September 15, 1964, at 10:00 a.m. for pre-trial.

Prior to pre-trial and not later than September 7, 1964, each party to these proceedings shall submit a separate pre-trial statement to the Court. A joint pre-trial statement is preferred and may be submitted in lieu of separate statements.

All discovery in these proceedings shall be completed on or before September 7, 1964.

Each party shall submit a complete trial brief on or before September 7, 1964.

Subject to the further order of this Court, the trial date for this cause is fixed for 10:00 a.m. on September 21, 1964.

Dated: April 28, 1964.

[Signature illegible] United States District Judge.

Approved as to form: M. W. Krause, Attorney for Plaintiff, Cecil F. Poole, United States Attorney. By: /s/ Charles Elmer Collett, Assistant United States Attorney, Attorneys for Defendants.

[fol. 242] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

ANSWERS OF DEFENDANT JOHN F. FIXA TO PLAINTIFF'S
INTERROGATORIES—Filed June 1, 1964

Comes now the defendant John F. Fixa, Postmaster, and answers the Plaintiff's Interrogatories as follows:

1. This defendant is not able to state whether or not the referred to statement of Tyler Abell is accurate as to current practice, but refers to section 9.13 of the Customs Regulations, as added by Treasury Decision 55797, approved December 27, 1962.

2. Refer to answer no. 1.

3. A list of countries is indeterminate, dependent upon the examination of mail deposited for delivery. Generally, the countries which have been subject to screening procedures are:

Albania

Bulgaria

China (any part of which may be under Communist domination or control)

Cuba

Czechoslovakia

Danzig

East Prussia

Estonia

Germany

(The Soviet zone and the Soviet sector of Berlin)

[fol. 243] Hungary

Indochina (any part of Cambodia, Laos, or Vietnam which may be under Communist domination or control)

Korea (any part which may be under Communist domination or control)

Kurile Islands

Latvia

Lithuania

Outer Mongolia
 Poland
 Romania
 Southern Sakhalia
 Tanna Tuva
 Union of Soviet Socialist Republics
 Yugoslavia
 Mexico
 Hong Kong
 Macao
 Japan
 Philippines
 Taiwan, Formosa

4. No.
 5. From February to December 1963 5,184,119
 From January to February 1964 922,730

6. (a) 8.81%
 (b) 2.52%

7. (a) Seven postal clerks and three mail handlers.
 (b) No answer required.

8. This defendant, unless specifically directed by this Court, objects to stating the names of said personnel, on the grounds that the names of such persons are wholly irrelevant and immaterial to the alleged issues of this case.

9. No effort is made to determine if material has been ordered by subscription.

10. From February to December, 1963 17,476
 From January to February, 1964 6,150

John F. Fixa, Postmaster.

Subscribed and sworn to before me this 28th day of May, 1964.

Harry R. Oliver, Deputy Clerk District Office the U.S.
 Nor Dist of California.

Proof of service [omitted in printing]

[fol. 244] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

ANSWERS OF DEFENDANT GEORGE BROKAW TO PLAINTIFF'S
INTERROGATORIES—Filed June 1, 1964

Comes now the defendant George K. Brokaw, Collector of Customs, and answers the Plaintiff's Interrogatories as follows:

1. The procedure in current practice is in accordance with the attached copy of the Bureau of Customs Instructions of January 4, 1963. This answering defendant is unable to state whether or not Mr. Tyler Abell's "generally speaking" statement referred to as attached to Plaintiff's Opposition to Motion to Dismiss is "accurate."

2. The same answer as No. 1.

3. There is no set list of countries subject to examination within the provisos of 39 U.S.C. § 4008. The examination varies from time to time with respect to different countries, depending upon the material deposited for mail deliveries.

4. No.

5. From February to December, 1963	5,184,119.
January and February 1964	922,730.

[fol. 245] 6. (a) 8.8%.
(b) 2.5%.

7. (a) Unknown.

(b) Four persons.

8. This defendant notes an objection to question no. 8 on the ground that the names of the four persons employed at the San Francisco Foreign Propaganda Unit are wholly irrelevant and immaterial to any issues that may have been raised by plaintiff's complaint herein. Said names will be withheld unless specifically ordered by this Court to give their names.

9. (a) Standard procedures which obtain in respect to

the examination of all imported merchandise are employed in the examination of mail parcels.

(b) No answer required.

10. The usual training process followed in training other Customs employees is followed in the training of Foreign Propaganda Unit. No specific training material is used other than the Acts of Congress, Customs regulations and Bureau letters of instructions such as the Bureau letter of instruction of January 4, 1963, referred to above, a copy of which is attached hereto. The usual on-the-ground training given all employees in the examination of merchandise gives them training on violations of the various Customs laws and the collection of any duties due.

11. The following are twenty representative publications which were reviewed by the San Francisco screening unit and determined by New York to contain communist political propaganda:

1. Oppose U.S. Military Provocations in the Taiwan Straits Area (pamphlet) (MC)
2. Oppose the New U.S. Plots to Create "Two Chinas" (pamphlet) (MC)
3. Drive U.S. Imperialism Out of Asia! (pamphlet) (MC) [fol. 246]
4. Two Different Lines on the Question of War and Peace (pamphlet) (MC)
5. Foreign Aid and South Korea's Reality (pamphlet) (NK)
6. Support the Just Struggle of the Japanese People Against the Japan-U.S. Treaty of Military Alliance (booklet) (MC)
7. A Proposal Concerning the General Line of the International Communist Movement (pamphlet) (MC)
8. Peking Review (magazine) (MC)
9. Ta Kung Pao (newspaper) (MC)
10. Red Flag (magazine) (MC)
11. People's Daily (newspaper) (MC)
12. Korea News (magazine) (NK)
13. Wen Wei Pao (newspaper) (MC)
14. Evergreen (magazine) (MC)
15. People's War, People's Army (NV)
16. Vietnam (magazine) (NV)
17. Vietnam Advances (magazine) (NV)
18. Hsinhua Daily News Release (MC)

19. Self-Dependence and Self-Sustenance—Way to Survival (pamphlet) (NK)

20. China Pictorial (magazine) (MC)

Abbreviation Key:

MC—Communist China

NK—North Korea

NV—North Vietnam

/s/ George K. Brokaw, Collector of Customs

Subscribed and sworn to before me this 28th day of May, 1964.

Edward F. Hennessey, Notary Public in and for the City, and County of San Francisco, State of California.

My Commission Expires January 3, 1967.

Proof of service (omitted in printing.)

[fol. 247]

ATTACHMENT TO ANSWER

TREASURY DEPARTMENT

Bureau of Customs

Washington 25

January 4, 1963

Circular: Res-15-Pen

Official Use Only

To: Collectors of Customs

Appraisers of Merchandise (Mail Division)

Subject: Restrictions and Prohibitions: Importation of Political Propaganda in the Mails.

References: Section 9.13, Customs Regulations, as added by Treasury Decision 55797, approved December 27, 1962.

1. Purpose

This circular is to call attention to Treasury Decision 55797, copy attached, promulgating regulations under sec-

tion 305, title III of the Postal Service and Federal Employees Salary Act of 1962, Public Law 87-793, approved October 11, 1962 (39 U.S.C. 4008), relating to Communist political propaganda arriving in the mails from abroad.

2. Action

The special customs units which will administer the law and regulations in question have been established at the ports of Chicago, Illinois, El Paso, Texas, Los Angeles, California, Miami, Florida, New Orleans, Louisiana, New York, New York, San Francisco, California, Seattle, Washington, and Honolulu, Hawaii. All mail subject to examination under this law will be submitted to the special customs units by the Post Office Department.

3. Effective Date

The above-mentioned law and regulations are effective on January 7, 1963.

4. Superseded Material

Circular Res-15-Pen, dated April 7, 1961, is hereby superseded.

File: PEN 633.3 K, Attachment.

Philip Nichols, Jr., Commissioner of Customs.

Distribution: B12, C12, D, E.

[fol. 248]

ATTACHMENT TO CIRCULAR

CC 633.3 R

- (T. D. 55797)

**Mail Matter, Communist Political Propaganda—Customs
Regulations amended**

Section 9.13, Customs Regulations, relating to mail matter
determined to be Communist political propaganda, added

**TREASURY DEPARTMENT
Office of the Commissioner of Customs
Washington, D. C.**

To Collectors of Customs and Others Concerned:

**Title 19—Customs Duties
Chapter I—Bureau of Customs
Part 9—Importations By Mail**

Section 305, title III of the "Postal Service and Federal Employees Salary Act of 1962", Public Law 87-793, approved October 11, 1962, added a new section 4008 to title 39 (The Postal Service), United States Code, entitled "Communist political propaganda." The section becomes effective on January 7, 1963.

Subsection (a) of section 4008 requires determinations to be made as to whether certain mail matter is "Communist political propaganda" in accordance with the definition prescribed by subsection (b) of section 4008.

Part 9 of the Customs Regulations is hereby amended, as set forth below, to add a new section 9.13 to place in collectors of customs the authority to make the foregoing [fol. 249] determinations. The new section also provides, among other things, that such determinations shall be communicated forthwith to the appropriate postmaster.

New section 9.13 shall become effective on January 7, 1963, and reads as follows:

9.13. Communist Political Propaganda.

(a) Collectors of customs shall make determinations required by subsection (a) of 39 U.S.C. 4008^a as to whether mail matter, except sealed letters, which originates or which is printed or otherwise prepared in

a foreign country is "Communist political propaganda" within the meaning of subsection (b) of 39 U.S.C. 4008⁹. Such determinations shall be communicated forthwith to the appropriate postmaster.

(b) A collector of customs is authorized to make the foregoing determinations with respect to all mail matter whether it arrives in the customs collection district under his jurisdiction or in a customs collection district under the jurisdiction of any other collector of customs.

(c) Subsection (c) of 39 U.S.C. 4008⁹ provides for the delivery of certain mail matter to specified classes of addressees without reference to whether such mail matter is "Communist political propaganda." The Post Office Department will determine which mail is in these categories. (Sec. 305, 74 Stat. 654; 39 U.S.C. 4008.)

[fol. 250] Part 9 is amended to add a footnote designated "9" reading as follows:

• (a) Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be "communist political propaganda", shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

(b) For the purposes of this section, the term "communist political propaganda" means political propaganda, as defined in section 1(j) of the Foreign Agents

Registration Act of 1938, as amended (22 U.S.C. 611 (j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951 or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended.

(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material whether or not "communist political propaganda" addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government mails an equal amount of material for delivery in any country described in subsection (b). (39 U.S.C. 4008.)

[fol. 251] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

DEFENDANTS' INTERROGATORIES—Filed August 20, 1964

To the plaintiff, Leif Heilberg, and to his attorneys:

Marshall W. Krause, Staff Counsel, American Civil Liberties Union, 503 Market Street, San Francisco 94105 and Coleman Blease, Esq., 969 Miller Drive, Berkeley, California:

The defendants by their undersigned attorneys, pursuant to Rule 33 of the Federal Rules of Civil Procedure as

amended, hereby serve the following interrogatories to be answered separately and fully in writing under oath and signed by said plaintiff within 15 days after service. Two conformed copies of such answers are requested.

In order to simplify the issues and resolve as many matters of fact as possible before trial, the defendants further request that if any of these interrogatories or portions thereof cannot be answered fully, such shall be answered [fol. 252] to the extent possible with the reasons for not answering more fully.

1. What is your full name?
2. Are you known by any other name?
Have you ever been known by any other name?
3. (a) What was your father's full name?
(b) Where was he born?
4. (a) What was your mother's name?
(b) Where was she born?
5. Where were you born, and on what date?
6. What schools did you attend, where, and through what grades?
7. (a) Did you attend college or university?
(b) If so, when and where?
8. (a) In which countries have you lived?
(b) State the dates and duration.
9. Have you been in Russia (USSR)?
(b) If so, when and for how long?
(c) For what reason?
10. (a) What countries have you visited?
(b) When, and for how long?
11. (a) Of what organizations have you been a member?
(b) When and where?
12. Of what organizations are you presently a member?
13. From which countries do you receive mail?
14. State the number of pieces of mail received from each country during the past year.
15. (a) From which countries have you solicited propaganda?
(b) What type of material?
(c) State the number of pieces received from each.
16. (a) By whom are you employed?
(b) For how long?
[fol. 253] (c) What type of work do you perform?

- (d) State your employers during the past five years and the work performed.
- 17. (a) Have you attended any schools or colleges in the United States?
- (b) Are you presently receiving instruction or giving instruction in any course of study?
- (c) If so, what, where, and for how long?
- 18. (a) What is the Universal Esperanto Association?
- (b) Are you a member?
- (c) Are you a delegate?
- (d) If so, when did you become a member, or a delegate?
- (e) What is the nature of your activity in the Association?
- 19. (a) What is the function of a delegate to the Universal Esperanto Association?
- (b) Are there other delegates in San Francisco?
- (c) If so, give their names and addresses.
- 20. (a) Does the Association receive mail of propaganda type from foreign countries?
- (b) If so, which countries?
- 21. Does each member also receive copies individually from each country?
- 22. (a) What is the purpose of the receipt of this material?
- (1) By the Association?
- (2) By you?
- (b) How is it used?
- 23. (a) Is the information or propaganda disseminated outside the organization?
- (b) If so, by whom, and under what circumstances?
- [fol. 254] 24. (a) Do you attempt to separate propaganda from other material?
- (b) Is the propaganda identified by you as such?
- 25. What utility does Communist propaganda have as to Esperanto?
- 26. (a) Have you ever appeared before a Congressional Committee?
- (b) If so, which Committee, and when?
- 27. (a) Whom do you consider was "wracked down in the mud" by a Congressional Committee?
- (b) Which Committee?
- (c) When?

28. (a) Whose name was destroyed by innuendo by a Congressional Committee?
(b) When?
(c) In whose opinion?

Dated: August 20, 1964.

Cecil F. Poole, United States Attorney. By: /s/
Charles Elmer Collett, Assistant United States
Attorney, Attorneys for Defendants.

[fol. 255] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

SUPPLEMENTAL ANSWERS TO PLAINTIFF'S INTERROGATORIES—
Filed August 25, 1964

Comes now the defendant John F. Fixa, Postmaster, and answers Plaintiff's Interrogatory Number 8 as follows:

The names of the ten employees of the Post Office, San Francisco, California, referred to in Interrogatory Number 7 are as follows:

Postal Clerks Steve N. Jeong, Jessie Julian, Aldo Cecchi, Edwin Signoracci, Haskell Sills, George W. Yee and Gilbert Williams;

Mail Handlers Wilbert Guydon, William Niles and Richard Gilbert.

Dated: August 25, 1964.

John F. Fixa, Postmaster. By: /s/ Charles Elmer Collett, Assistant United States Attorney.

[fol. 256]

AFFIDAVIT

I, Charles Elmer Collett, being first duly sworn, depose and say that I am an Assistant United States Attorney; that the defendant John F. Fixa is Postmaster at San Francisco, California; that the Post Office Department is an agency of the United States;

That the supplemental response to interrogatories has been made on the basis of the information provided by the office of the Postmaster defendant in San Francisco, California, and upon such information affiant subscribes to the response to said interrogatories.

/s/ Charles Elmer Collett, Assistant United States Attorney.

Subscribed and sworn to before me this 25th day of August, 1964.

Victor J. Fox, Deputy Clerk, District Court, the U.S. Nor. Dist. of California.

[fol. 257] CERTIFICATE OF SERVICE BY MAIL. (omitted in printing.)

[fol. 258] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

SUPPLEMENTAL ANSWERS TO PLAINTIFF'S INTERROGATORIES—
Filed August 25, 1964

Comes now the defendant George K. Brokaw, Collector of Customs, and answers Plaintiff's Interrogatories 8, 9, and 10 as follows:

Answering Interrogatory Number 8, the names of the four persons employed at the San Francisco Foreign Propaganda Unit are as follows: W. H. H. Cheng, Supervisor; K. W. Wang, Customs Translator, Chinese language; T. Yassueda, Customs Translator, Japanese language, and J. Selby, Customs Translator, Korean language.

Answering Interrogatory Number 9, only second-class material is examined. If from the addressee, and the addressor, the nature of the contents is already known, it is not opened and read. If the material is suspected, it is opened and read. The determination as to whether or not it is propaganda material is made by the Assistant Deputy Commissioner in New York.

Answering Interrogatory Number 10, the personnel in the Foreign Propaganda Unit are employed through Civil [fol. 259] Service, and necessarily must have satisfied the job description requirements. Each employee has an individual requirement depending upon his grade. The translator, in addition to his knowledge of the language and ability to translate, is required to have a general knowledge and background in political science, law, and any specific technical knowledge which may be required to read the materials involved.

When new personnel are assigned to the Unit, their training is effected on the job, and involves the identification of various items of mail as to weight, appearance, and identifying address, either of the sender or the receiver. W. H. H. Cheng is the Supervisor of the Unit, and he supervises the training.

Dated: August 25, 1964.

George K. Brokaw, Collector of Customs. By: /s/
Charles Elmer Collett, Assistant United States
Attorney.

AFFIDAVIT

I, Charles Elmer Collett, being first duly sworn, depose and say that I am an Assistant United States Attorney; that the defendant George K. Brokaw is Collector of Customs at San Francisco, California; that the Bureau of Customs is an agency of the United States;

That the supplemental response to interrogatories has been made on the basis of information provided by the

office of the Collector of Customs, defendant, in San Francisco, California, and the office of the Assistant Deputy Commissioner of the Bureau of Custom in New York, and upon such information affiant subscribes to said responses to said interrogatories.

/s/ Charles Elmer Collett, Assistant United States Attorney.

Subscribed and sworn to before me this 25th day of August, 1964:

Victor J. Fox, Deputy Clerk, District Court, the U. S. Nor. Dist. of California.

[fol. 260] CERTIFICATE OF SERVICE BY MAIL (omitted in printing.)

[fol. 261] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

[fol. 262] MOTION FOR SUMMARY JUDGMENT—Filed September 14, 1964

The defendants and each of them hereby move the Court for summary judgment against the plaintiff in this cause, on the ground that there is no genuine issue of material fact remaining, and that said defendants are entitled to such judgment as a matter of law, for the reasons and upon the authorities stated below. Said motion will be made upon the records and files of this case.

REASONS AND AUTHORITIES

The Motion for Summary Judgment is made upon the following grounds:

1. That the action is moot.
2. That there is no substantial constitutional question.
3. That Section 4008 of Title 39, United States Code, is constitutional.

[fol. 263] Dated: September 11, 1964.

Cecil F. Poole, United States Attorney. /s/ Charles
Elmer Collett, Assistant United States Attorney,
Attorneys for Defendants..

[fol. 264] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

ANSWERS TO DEFENDANTS' INTERROGATORIES—Filed Septem-
ber 14, 1964

[fol. 265]

Vienna,
Sept. 4, 1964.

To whom it may concern:

The statements below are my answers to the "Defendants' Interrogatories" in the case of civil no. 41660, in The United States District Court for The Northern District of California, Southern Division.

1. Leif Heilberg.
2. No. No.
3. a Aksel Skjold Heilberg.
b Helsingor, Denmark.
4. a Elsa Gunhild Frideborg Hansson.
b Fredensborg, Denmark.
5. Copenhagen. October II. 1932. (Denmark)
13. From the most countries in the world.
14. Impossible; as no account is made of the number of

letters received, plenty of letters received unsolicited going in the waste paper basket, and much "junk mail" also received. However, a conservative estimate would put the number of letters as no less than 1000 to 2000 per year.

15. None solicited.

18. a The Universal Esperanto Association is an organization internationally coordinating the work of national and specialised Esperanto associations for the purpose of promoting The International Language.

b Yes.

c Yes.

d I became a member in 1952 and a delegate in 1954.

e As a special delegate I reply to inquiries concerning the matters I am a special delegate for. (a vague analogy would be the Commercial Attaché compared with the Consul General, the latter in U.E.A. being the general delegate)

19. a The function of a general delegate to the U.E.A. is to represent the association in the local esperantist movement, to procure members for U.E.A., and to promote the use of Esperanto locally.

b Yes.

c I cannot, as I do not have the U.E.A. manual with me in Europe. However, in the San Francisco telephone directory under the name of "Esperanto Society of S.F." is listed a number where all such information can be had.

20. I do not know what mail the association receives.

21. I do not know who receives what in their mail, but it seems most unlikely that the sources of propaganda dissemination could obtain lists with names and addresses of the members in the various countries. In the above mentioned manual appears the names and addresses of the delegates and other officials only.

22. a This question is patently phrased to give the idea that there is any purpose at all in the receipt of "this material". When question 15 has been answered with "None solicited" as could be, and as it has been done, subsequent questions should not imply a necessity for a purpose of receipt of propaganda material. When the material is not solicited, its receipt is simply the logical performance for mail sent to a person residing in a free society, without any "Big Brother" censors telling him what he can or should read.

[fol. 266] b After thumbing through the pages of any magazine that you might classify as "propaganda", I either

throw it in the waste paper basket, or I send it where people may see that The International Language is used, like the national languages, for all purposes of communication.

23. a If by "the organization" you mean U.E.A., you are right, as U.E.A. does not distribute propaganda, being neutral as regards politics.

b The distributors of what you call propaganda (and what you probably would specify better as Communist propaganda, not Capitalist propaganda I imagine) would mainly be the publishers of such literature, like in the U.S. one esperantist distributes "capitalist propaganda" seemingly published by himself. I further think that some individuals taken in by the Communist theories, and probably quite a few persons living in Communist countries, distribute the material throughout the world either for ideological reasons, or simply as a way of reimbursing western esperantists for their kindness in sending things from the Western World. The latter case is mine. One esperantist I met from the Soviet Union insisted on repaying my kindness to him by paying subscription for me to a couple of "red" esperantist magazines.

24. a A person with an average intelligence easily spots propaganda and has no need to "attempt" any separation.

b Yes, it is easily identified by me, in the form it usually appears.

25. None whatsoever, except perhaps, as above explained, that a language is nothing but a means of communication, like is English, French, German, etc., and that the fact that Esperanto is extensively used by more and more bodies, governmental as non-governmental (Voice of America, Unesco, etc.) is always welcomed by the esperantists.

I hereby declare that the above answers have been made to the best of my ability, in the way I have understood the questions posed to me.

Leif Heilberg.

B.R.Z. 658/64

Die Echtheit der Unterschrift des Herrn Leif Heilberg, Vertreter, PO BOX 62, Los Angeles, Californien 90028, derzeit in Wien 16., Degengasse 35, wird bestätigt. . . . Wien, am vierten September eintausendneunhundert. . . . sechzig. . . .

[Copy Illegible]

[fol. 267] [File endorsement omitted]

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

**Before: Honorable Homer T. Bone, Honorable Albert C.
Wollenberg, Honorable Alfonso J. Zirpoli**

No. 41660

LEIF HEILBERG, Plaintiff,

VS.

JOHN F. FIXA, ET AL., Defendants.

Transcript of Pretrial Conference—September 15, 1964

[fol. 268] **APPEARANCES:**

Plaintiff: Marshall W. Krause, Staff Counsel, American Civil Liberties Union, 503 Market Street, San Francisco, California, and Coleman Blease, Esquire, 969 Miller Avenue, Berkeley, California. By: Coleman Blease, Esquire.

Defendants: Cecil F. Poole, United States Attorney, 450 Golden Gate Avenue, San Francisco, California. By: Charles Elmer Collett, Assistant United States Attorney.

[fol. 269] **PROCEEDINGS, SEPTEMBER 15, 1964, 10:00 A.M.**

The Clerk: Heilberg versus Fixa, Pretrial Conference. Counsel, state your appearance for the record, please.

Mr. Blease: Coleman Blease appearing for the plaintiff.

Mr. Collett: Charles Elmer Collett, U. S. Attorney's Office, appearing for the defendants.

**STATEMENT ON BEHALF OF PLAINTIFF BY MR. BLEASE AND
COLLOQUY**

Mr. Blease: The trial of this matter insofar as the evidence which we have to offer, Your Honors, should take a day or even less than a day. We plan to offer approximately seven witnesses, three of whom were recipients of these POD forms notifying them that they were recipients

of mail which had been classified as Communist political propaganda, and they will testify generally they were inhibited in returning the card. We will present them for that purpose and, also, introduce the cards which they had received.

Beyond that the witnesses would be persons related to the administration of the program in San Francisco. More specifically, Mr. Brocaw, Mr. Cheng, who is the supervisor of the propaganda screening division for the Customs Bureau, and Mr. Wang, who is a Customs Translator. [fol. 270] In addition, we would like to call one postal clerk from the Post Office side of the screening unit. That would be the substance of the witnesses. The latter witnesses, of course, to describe the operation of the program in San Francisco and to testify according to those items of sequence that we have outlined in our statement of facts.

Beyond that our evidence would consist, and we would like to have the Court take judicial notice, of at least two public hearings on this matter, one of which you already have in your possession, which the U. S. presented at a prior hearing, which was the hearings conducted on the bill which resulted in Section 4008, the other document being hearings by the House, Post Office and Civil Service Committee of June 19th and 20th of last year, 1963, which contain statements by Mr. Tyler Abell of the Post Office Department and Mr. Fishman of the Customs Bureau regarding the operation of Section 4008 as of that date. We will submit prior to the trial date an index of those portions of those documents which we would like to call to the attention of the Court.

Lastly, I am in hopes that the Government will stipulate to the introduction of the record at the hearing on the motion to dismiss, along with the exhibits which were taken at that time, and the answers to the interrogatories which [fol. 271] we submitted to the defendants.

I have in preparation, also, an analysis of the legislative history of 4008 which should be ready by today or tomorrow.

Judge Zirpoli: The case in New York is before the Supreme Court, is it?

Mr. Blease: The Lamont case has now been noted for appeal.

Judge Zirpoli: Let's assume for the moment the Su-

preme Court were to say that the order of the three judge court dismissing the complaint is proper. What would you do?

Mr. Blease: We would still be in business, Your Honor.

Judge Zirpoli: Would we have the courage to continue with this proceeding if they were to dismiss that proceeding?

Mr. Blease: Well, I am sure you would have the courage but I think you would also have the wisdom. And for the following reasons . . . As I think is adequately indicated in this pretrial memorandum on the law. The Lamont case was in part based upon errors of fact, and the issues arising out of the detention of the mail were mooted in the Lamont case because the Court was under the belief, mistaken, we believe, that since Lamont had been notified by the Post Office Department that the mail would not be [fol. 272] further detained, that in fact the detention issue was then and thereby mooted.

If our version of the way in which Section 4008 operates is correct, even despite the notification by the Post Office Department, the mail, in this case, going to Mr. Heilberg, is detained in several instances, and the precise sequence of events is important here to demonstrate—

Judge Zirpoli: Where is the difference from the manner in which it was detained insofar as the man in New York is concerned, which goes to the same mechanics?

Mr. Blease: In New York the Court believed that the notification saying, we will no longer detain, ended the detention question. What we are saying is, that the Court misunderstood the way in which the system operates. In fact, there are still detentions involved even despite the notification.

Judge Zirpoli: The Supreme Court has all that. It has that method of detention before it, doesn't it, in the record of the Lamont case? They discuss it. It is part of the opinion, both the majority and the dissenting opinion.

Mr. Blease: I have looked at the pleadings in the Lamont case, and the matter was submitted for summary judgment [fol. 273], as you know, and the details of the program were simply not argued before the Court and the Court was not apprised of it and they were not raised in the pleadings.

Judge Zirpoli: Where did they get all the facts which they cite in their opinion?

Judge Wollenberg: Very definitely it goes to the constitutional question.

Mr. Blease: Of course. But I am merely mentioning one of the points.

Judge Wollenberg: And, therefore, isn't the question before the Supreme Court of the United States the very basic question here, about the constitutionality of the whole matter, the legislation? Isn't that the point which is really before the Supreme Court of the United States? It is true factually there are distinctions, and maybe errors of fact in its findings, but the opinion of the three judge court, which is now on appeal, very clearly discusses, does it not—

Judge Zirpoli: They turned basically on their conclusion that there is no controversy and, therefore, they should dismiss. If they say there is no controversy in New York . . . The thing I find some difficulty reasoning with is how can we help but find there is no controversy here?

[fol. 274] Mr. Blease: Because there is a factual finding involved. It has nothing to do with the law.

Judge Zirpoli: When the factual finding is finally boiled down, the injury is no different here than it was there.

Mr. Blease: The New York court was misapprised of the nature of the detention, and they believe that the notification from the Post Office ended the detention process. In fact, it did not, and we are willing to prove it, and part of the witnesses we put on, and the documents we have submitted, are for the precise purpose of showing that the detention goes on.

Judge Zirpoli: One of the questions which was raised was the keeping of the list.

Mr. Blease: It is a second and separate issue.

Judge Zirpoli: And wanted to have an injunction insofar as that aspect was concerned. Now, must they not of necessity pass upon the constitutionality of the statute in order to pass upon the propriety of the Court denying injunctive relief by dismissing the complaint?

Mr. Blease: With regard to that separate point. Your Honor, the Court also underwent a factual misapprehension. The Court in reviewing the questions tendered by the . . . Lamont's name being on the list . . . said that the test

here is whether or not . . . I guess there is some reasonable [fol. 275] apprehension that some injury will flow to Lamont as a result of having his name there.

Apart from this test, and accepting that test for the moment, the Court believed that the operation of 4008 was different from the operation of the statute existing prior to its being discontinued by President Kennedy on March 17, 1961. I think the Court was in error in that belief, as our legislative history will show, that the current program is really a reinstitution of the program existing prior to March 17th. Now, the Court did not go into its evidence there. It merely asserted it as a conclusion. But I do believe that the legislative history had not been briefed for the Court in the Lamont case and it was not before the Court and, therefore, they were in error in believing that the program was different and, therefore, in part the policy was different.

Judge Zirpoli: The Supreme Court can correct if what you say is true. And when they correct these errors, if these are errors . . . I am just speaking as one member of this Court . . . but I cannot help but feel that a ruling of the Supreme Court in the Lamont case will actually be dispositive of the very proceeding before us. It is hard for me to see how the Supreme Court can write an opinion in that case without at the same time touching upon and conclusively deciding upon the matters we would have to pass [fol. 276] on.

Mr. Blease: What I think is a distinct possibility in that case, Your Honor, is that the Court will look at what it has before it. I have just this week received the document from Mr. Budine, Mr. Lamont's counsel, presented to the Court, and the same errors are still present in that document and they have not corrected them.

The Court may very well, if this case is not argued differently, see fit to agree with the lower court on the procedural questions and moot the case, in which case we would be left with this case.

Judge Zirpoli: If they moot the case, they are saying that the very thing that you are complaining about is all right, that the Government can say to them, you have to comply and the minute you raise a constitutional question you do not have to comply and, therefore, it becomes moot.

Judge Wollenberg: I do not see how any court, particularly the Supreme Court, can write an opinion, publish an opinion, without facing the basic issue that is involved here, that is, the constitutionality of the entire matter. To say the Court was wrong and correct an error, change a factual error, but when they do that, then, they have to come to some disposition of the controversy and what is [fol. 277] involved here. When they do that, I think they have to face that very issue.

Mr. Blease: If the factual error goes to the question that I raised relating to the detention of the mail, then, they might very well moot the case by saying simply that Lamont was no longer involved in this case and the constitutional questions are not presented.

Judge Zirpoli: If they say that, shouldn't we be saying the same thing, that Heilberg is no longer involved and it is moot as far as he is concerned. If it is moot for Lamont, it is difficult for me to see how it cannot be moot for Heilberg.

Mr. Blease: We have a different record, Your Honor.

Judge Zirpoli: I recognize that you will make this observation, but the difference in the record is not so significant. And you corrected me when I used the word "courage" and said I should have said "wisdom." The reason I used the word "courage" was because that I didn't feel it would be quite appropriate for me to use the word "gall." I think that is what we are faced with the moot question.

Mr. Blease: Having been raised in a law school that believed that the lawyer took some active part in the legal process, came to believe that the way in which the case [fol. 278] presented to the Court and the way in which it was briefed was very important to the ultimate resolution. I hope I am not misinformed about that.

Judge Zirpoli: Mr. Blease, I shall make one observation, as one member of the Court. I compliment you as to the quality and character of the pretrial statement and trial brief which you have submitted to the Court.

Judge Wollenberg: It is excellent. It is of great assistance to the Court.

Mr. Blease: My only point is that I think the issues raised here and the constitutional framework in which these issues are being raised is quite different than it was raised in the Lamont case, and that the Court will not have that in front

of it. Now, the Court, I must admit, might decide to take it anyway. And it could, in that event, rule on these matters. However, I do feel that this case will tender the issues in a clearer light than that case and will correct errors of fact which the Court might be disposed to otherwise accept and present this case in the manner in which it will have it rendered in a proper constitutional light. Besides which, we have a different plaintiff here; his rights are at stake.

Judge Zirpoli: He is not being particularly prejudiced [fol. 279] now and any prejudice that came to him has already happened. Now, whether this Court should stay these proceedings pending the decision of the Supreme Court, because there is no further injury likely to come to your client so no prejudice will follow by awaiting the ruling of the Supreme Court.

Mr. Blease: Beyond what I have already said, if Your Honors were disposed to continue with this matter, and I believe that you should, that this case when presented to the Court in conjunction with the Lamont case will enable the Supreme Court to properly and in detail deal with this question. There are literally millions of people involved in this statute ultimately. This is an issue in which millions of pieces of mail are being detained during the year that goes to people throughout this country. It is an issue of great magnitude. And I think to deprive the Supreme Court of all of the advantages which would come to it from the mature consideration given to it, not only by the Court in New York but by the Court here, that the high court would welcome the presentation of this case along with the Lamont case.

Judge Zirpoli: I am not commenting on the latter observation.

Judge Wollenberg: Only to say that I do not think this [fol. 280] could get up there to be considered together and with that case. That is there and has been there for some time now. It must be calendared.

Mr. Blease: I do not believe it has been calendared.

Judge Wollenberg: In any event, it would not be considered together. The point, therefore, would be, in my mind, that this case could very easily follow right directly behind. It is not in any way disposing of this case. It is not in any way prejudicing the case, as far as I can see, Mr. Heilberg awaiting an opinion. Besides, any prejudice

directly on him, or these pieces of mail that you speak about, they would not be disposed of. This could come along very rapidly behind the other case.

Mr. Blease: May I briefly describe what happens to this mail because it is important.

As a result of this program, mail which would have gone to hundreds of post offices around the country are now detoured through 11 screening points. There is a great delay that is occasioned by the simple process of having now to send this to a different place than it would otherwise be sent, and this affects all of the mail which comes from these foreign countries.

Judge Zirpoli: First class?

[fol. 281] Judge Wollenberg: No.

Mr. Blease: According to the testimony, possibly even the first class mail is also delayed because there is no simple way at that point of separating that mail from amongst all the other mail.

Mr. Abell in testifying on this point in hearings in Washington, D. C. said that the mail coming from the foreign countries comes in large sacks and the sacks are not sorted out so that the first class mail or the sealed mail . . . same classes are not applied to foreign mail . . . but the sealed mail is not separated out under the postal union operation from the other mail. So they get all these large sacks which they dump out and sort when this mail is sent here so that even sealed letters, what we call first class letters, are delayed as a result of this process.

Judge Zirpoli: Well, the Post Office could do that without any legislation, couldn't it? There is nothing to prevent them from using that for all mail.

Judge Wollenberg: They still have to sort the mail.

Mr. Blease: What I am saying is that the sorting takes place at the screening place and the screening place imposes the delay because they have to send it to a separate place. What I am saying is that all the mail is delayed, at least [fol. 282] for that amount of time that is occasioned by sending it to a different place. That is not even talking about the additional delays which occur to mail other than sealed letters.

Judge Wollenberg: You mean all mail, all European mail, is delayed because of this statute?

Mr. Blease: All mail coming from at least the Communist countries are delayed as a result of this, as I understand from reading the hearings, all of the mail.

Judge Zirpoli: Would you question the right of the Post Office to do this?

Mr. Blease: Yes.

Judge Zirpoli: As a part of its own departmental work to say that the mail from the foreign countries should go to the following stations initially.

Mr. Blease: This turns upon the purpose which occasions the delay. And what I am trying to indicate here is that if you do it for a purpose which is clearly within the power of the Congress, then the question of whether the delay is constitutional or not is probably largely in their discretion.

But where the delay is occasioned because you have a statute operating, in part at least, under an unconstitutional purpose, then that delay is a direct injury to a constitutional [fol. 283] right, and permits us to raise all of these issues.

I might say that the delay is even longer than that for all that mail which is not sealed letters or exempt mail which is first sorted out from this pile of the screening unit and forwarded immediately, that all of the rest of the mail is then searched, some of it read, opened and classified as to its political content. All of the rest of the mail is. And it is only at that point do they check this list of POD forms, which is the only place where Heilberg's name is now, to determine whether or not it is to be sent on directly without further inquiry. So Heilberg's mail, and all of it coming from these countries, is delayed even that additional period of time. And where the local people are in doubt as to the classification, that mail is sent to New York City for Mr. Fishman's appraisal as to its classification, delayed even further. So there is the possibility that Mr. Heilberg's mail is delayed weeks, maybe months, as a result of this process, even though his name has been placed in these card files of POD forms. That is one of the things that we will demonstrate at the trial.

As a matter of fact, if you think about the operation of the program, it would be difficult to conceive of them doing [fol. 284] it any other way than handling it this way. I think this is the most efficient way of handling it, given the program, but the program is what engenders all of this

delay and, literally, the whole mail system involving mail from these countries has been impaired as a result of this statute. And Mr. Abell was rather frank about that in connection with these hearings.

Judge Zirpoli: Where is Mr. Heilberg now?

Mr. Blease: Mr. Heilberg is in Europe.

Judge Zirpoli: Is he coming back to the United States?

Mr. Blease: He has so informed us he is, yes. In December.

Judge Bone: What is happening to his mail during his absence?

Mr. Blease: I do not know.

Judge Bone: It might be piling up at his home.

Mr. Blease: I do not know whether he has followed the procedure of having it forwarded or not.

Judge Bone: You have made no inquiry?

Mr. Blease: It was very hard to reach Mr. Heilberg to get the answers to the interrogatories. He is apparently all over the country.

Judge Zirpoli: The answers to the interrogatories were [fol. 285] answered presumably in Vienna.

Mr. Blease: Yes. We had originally a French address and we sent them there and ultimately it was forwarded to him.

Judge Zirpoli: Isn't this a further indication that no particular harm would come by awaiting the ruling of the Supreme Court?

Mr. Blease: As I tried to indicate, and I think the constitutional law permits Heilberg to raise issues not only which are personal to him but also to raise issues involving the rights of third parties.

Judge Zirpoli: The Supreme Court is going to rule on that on this motion to dismiss. They cannot help but rule on that question. That is raised in the Lamont case.

Mr. Blease: Your Honor, if I may venture this one observation: That the law in this area is not terribly clear, and most all the cases . . . in fact, I can think of no exception . . . have only permitted the raising of the rights of third parties after they had demonstrated a right involving themselves has been tendered so you cannot raise the rights of third parties without at some point yourself having your own personal right involved.

So if they moot the case with respect to the detention [fol. 286] issue for Lamont and rule adversely against him on the listing requirement, then he cannot raise the issues of third parties because he has not met the primary threshold requirement.

Judge Zirpoli: If they rule in the fashion you have just indicated, I do not see how this Court can help but rule the same way for Heilberg.

Mr. Blease: That goes back to your—

Judge Zirpoli: That goes back to my other question and, therefore, all of the issues that are being presented here appear to me to be before the Supreme Court right now.

Judge Wollenberg: The basic issues have to be. I do not see how they could do otherwise. They have it in a case in which there is a very well and lucidly expressed dissenting opinion. It discusses those issues. They are going to have to meet this. I would be greatly shocked if they would not meet the very issues we are concerned with here. In any event, this case would be so close behind it since it is now being processed through . . . I do not know exactly what stage it is.

Mr. Blease: If we were to put this the other way, the case now has already occupied a considerable amount of time of Your Honors. One more day of hearing, at best, is involved. The matter at that time will be submitted. [fol. 287] Judge Zirpoli: But there is more than one day of hearing involved. There is the serious responsibility of writing an opinion which may take several days of time, and exchanges between the judges in a pretty busy court. And we ought to be trying some of these other cases.

Judge Wollenberg: Let me say that I think your statement, the legal portion, and the points in your trial brief, are beautifully presented. You cite all the cases that apparently are available. You have followed pretty much Mr. Katzenbach's presentation as set forth when he opposed the passage of this legislation before the committee. And I am sure this is the very basis, these cases and this determination, upon which the Supreme Court must rule.

Judge Zirpoli: I have a great regard for Mr. Blease and I am pleased with the quality and the nature of the statement and brief that he presented.

Judge Wollenberg: Yes.

Judge Zirpoli: But I cannot agree with him that there is a real marked difference in the cases.

Mr. Blease: May I suggest one other point of distinction, since no testimony was taken in the New York case, no testimony was taken with respect to the impact of this— [fol. 288] Judge Zirpoli: Do you think testimony need be taken?

Mr. Blease: Well, if you follow the reasoning of Justice Black in the Talley case, he did not feel the need of any evidence whatever with respect to the disclosure provisions involved.

Judge Zirpoli: If the Supreme Court follows the reasoning in your brief, the reasoning of Mr. Katzenbach or the Department of Justice, they do not need any either, do they.

Judge Wollenberg: Mr. Katzenbach's presentation before that Committee was clearly without any factual evidence but just the basic things required by that statute alone.

Mr. Blease: Just to reiterate. I think the factual presentation here is different. We will have those facts available for the Court, the legal authority and structure of it is different, and the Court would have that before it as an aid to its decision.

Judge Zirpoli: What you will have before us in the way of additional factual situation are facts which go to confirm the ultimate facts that are already conceded by the Government. That is what it amounts to.

Mr. Blease: No. As a matter of fact, the Government [fol. 289] argued in the Lamont case that the detention had ended with the notification to Lamont that nothing further would happen to his mail and it would be sent on to him. Now, that was simply an error if you view the operation of the statute as we have here depicted it. That was the Government's position.

Judge Zirpoli: The error, such as it is, is something presumably as to which the Court has judicial notice because the reports before the Committee will contain the information to correct any such error.

Mr. Blease: If the Court is willing at the Supreme Court level to take judicial notice of these documents, then it could correct that, that is true.

Judge Zirpoli: You could say the District Court could take judicial notice of it and we, therefore, notice that which the District Court could have judicially noticed.

Mr. Blease: Yes, the Supreme Court could take that tact. It could resolve the issues, I am not denying that for a moment.

However, these raise issues of tremendous consequence in this country, and I think to have before the Supreme Court all of the advantage and the wisdom of the various judges who have considered this matter and taken the evidence and thought about it, and their considered opinion [fol. 290] would be of enormous help to the Court and that, therefore, I think you would be performing the highest judicial duty if you were to proceed with this matter and submit to the Court your determination of the constitutional issue involved here and the facts. I would think that would be wholly in keeping with the responsibilities—

Judge Wollenberg: I think we should, before proceeding to determine what our feeling is and what we are going to do in this regard, confer on it and respond to counsel on both sides.

Judge Zirpoli: I think before we hold a conference, let's see if Mr. Blease has any other thoughts as to why we should proceed—

Judge Wollenberg: Yes.

Judge Zirpoli: Assuming the case is going forward to the Supreme Court.

Are there any other reasons that you have in mind as to why we should proceed with this case other than those you have expressed?

Mr. Blease: I cannot think of any at this moment. If you would, give me five minutes.

Judge Zirpoli: Let's hear from Mr. Collett.

Do you have any thoughts to express, Mr. Collett?

STATEMENT ON BEHALF OF DEFENDANTS BY MR. COLLETT AND COLLOQUY

Mr. Collett: If the Court please, I think Your Honors have indicated that the problem here with regard [fol. 291] to Mr. Heilberg, as I know from the answers to the interrogatories . . . he did not answer them all. But there is no problem of any particular damage to him.

Judge Wollenberg: He did not have to answer all of them. I told him that.

Mr. Collett: That is right. But he had to answer 16 and 17, which he did not answer. The ones he did not have to answer by your order he did not, but he did not answer 16 and 17. But essentially it is all in the same pattern anyway.

But he has been getting all of the mail. And the matter of detention or delay does not seem to me to raise a question that is of any novelty.

I was rather interested in the statement that he makes with regard to 22 where he says:

"When the material is not solicited, its receipt is simply the logical performance for mail sent to a person residing in a free society, without any 'Big Brother' censors telling him what he can or should read."

Well, the whole complaint here is framed with regard to the unconstitutionality of 4008. All of this other matter, to my mind, goes off as to the manner in which the statute which has been enacted by Congress is [fol. 292] implemented by the Executive Department as it endeavors to perform what Congress has required it to perform by the statute.

We are way off on matters pertaining to mail handlers and people who are personnel in the Customs Department and in the Post Office and talking about points at which the mail may be first screened. But as far as Mr. Heilberg is concerned, all this is immaterial. He does not show anything in the way of any specific damage to himself, nor can he show any. This is an endeavor to try to reach at the entire statute. And as I think you well pointed out, the Supreme Court, if it has it before it now in the Lamont case, all these things are going to be considered, as you well know. When the Supreme Court gets a question of this kind, it will certainly require the presentation of everything that is in the legislative history and all the statements that have been made before the Committee.

So it seems to me that this Court is going to be required to labor through all of the work of repeating what has already been done in the Lamont case.

Also, the Amlin case was down in Los Angeles. That case was dismissed. Also, the McReynolds case in New York, in which there has been a motion for summary judgment by the plaintiff, was denied, and the motion to [fol. 293] dismiss, and it raises all the same type of questions likewise. I do not know whether there has been an appeal to the Second Circuit in that case.

But it seems to me that this case is one that should await the decision of the Supreme Court and if there is anything to go forward on, let's go forward on it.

But, certainly, appearing here on behalf of the defendants, there is the Congressional record, and what Mr. Abell has said. There's nothing to hide that I know of. The matter is quite clear as to what has been said. And why should this Court repeat the work which will undoubtedly be presented to the Supreme Court.

I do not know whether you want to ask me anything, but to the extent of the brief . . . Mr. Blease, I have talked to him personally, and I think he is sincerely endeavoring to pursue what has been a question of his authority, has been after it for some considerable time and he has certainly presented a brief to the Court which I hope and trust is as ably presented to the Supreme Court by other counsel. I am sure it will be.

The extent to which these cases and quotations taken from them raise matters that may be issues of serious import, I don't know. I fail to see where there is any great serious question as to Mr. Heilberg. I do [fol. 294] not see any irreparable damage.

I think the only thing he has challenged is the constitutionality of the section, and I think that is specifically what is here.

To expand that, to go into something in the nature of a Parker V. Lester type of case, which is not even alleged in the complaint, that the manner in which the Executive Department implemented the statute by promulgating regulations which are contended to be unconstitutional, then you have not an issue of the constitutionality of the original statute but the manner in which it is being executed or the Executive Department is administering it. I do not see that it is here. And it has been the reason that I felt objections to the materiality of the interrogatories that

were proposed was a good objection; that it is going far afield of the issue which is actually presented by the complaint, and that is, is the statute constitutional.

It would be my motion that the matter be continued or stayed, the proceeding here be stayed until the Supreme Court renders its decision in the Lamont case.

Judge Zirpoli: Mr. Blease, do you want to add anything now?

FURTHER STATEMENT ON BEHALF OF PLAINTIFF BY MR. BLEASE AND COLLOQUY

Mr. Blease: Well, I would only correct one point with [fol. 295] respect to the issues tendered here. I gather that a part of Mr. Collett's argument is that we have not raised the issues surrounding the administration of the Act as distinguished from the attack on the statute on its face. I think that is incorrect.

The pleadings are to be deemed amended to conform to the testimony and to the facts which have occurred subsequent to it, including facts which occurred as a result of the United States Government's acts including placing Mr. Heilberg's name on this list, and notification and other issues which have been raised and all the other issues.

Judge Bone: Mr. Blease, how would Mr. Heilberg undertake to prove that there are millions of people included. I used to work in the mail service as a boy. I am curious. How would a man undertake that almost inhuman task of proving that, bringing in all of these parties who assume to exist. How would he prove it? Is he trifling with the Court, or what?

Mr. Blease: We have statistics showing the number of people who did not respond to the POD forms.

Judge Bone: You mean you are relying on some statistics?

Mr. Blease: That is the first part of it. The second part of it, we would put witnesses on showing that at least [fol. 296] one of the reasons for not returning the form is that the people are frightened, and you can draw the inference from that that the other people are in the same situation.

Judge Bone: Those are assumptions presented in some form of evidence in which the Court reaches certain conclusions. It is not our task to type the method of and the reasons for their conclusions. They state them plainly enough. I have yet to challenge the Court's reasons in achieving certain conclusions. At least, it is a task I would not undertake.

Mr. Blease: I think certain inferences can be drawn from this evidence, and the testimony we would present, and I think it is a proper and permissible inference to draw.

Furthermore, Mr. Abell in the hearings has testified he received hundreds of letters from irate people regarding these forms and the program. So there are various ways in which we would raise in an attempt to prove that.

Judge Bone: Do you propose to introduce those letters?

Mr. Blease: No. Merely Mr. Abell's statements in that regard.

Judge Bone: Just what would we have before us in the form of evidence?

[fol. 297] Mr. Blease: You would have Mr. Abell's statements in regard to what he received.

Judge Bone: Accept that as substantive evidence of some sort.

Mr. Blease: Yes.

Judge Bone: You do.

Mr. Blease: Yes.

Judge Bone: You would ask me to believe that there are hundreds and hundreds of letters, none of which would be in evidence?

Mr. Blease: Yes.

Judge Wollenberg: You see, he is offering the testimony of Mr. Abell who is an official of the Post Office Department in charge of this program.

Judge Bone: I thought you were referring to Mr. Heilberg.

Judge Wollenberg: Mr. Abell testified before the Committee, and his statistics referred to are statistics that came from the Post Office Department and which were presented to the Senate Committee. Those are the statistics.

Is it those are the statistics?

Mr. Bleasé: Yes.

Judge Bone: Have any of them, aside from Mr. Heilberg, appeared in this case or sought to intrude [fol. 298] themselves into the case?

Mr. Bleasé: We would offer the testimony of other people who had received—

Judge Bone: I know. But some parties in this action.

Mr. Bleasé: No, we are not joining any parties, Your Honor. We have argued that in certain circumstances it is permissible for Mr. Heilberg to raise the rights of third parties.

Judge Bone: Do you argue that he has the right, constitutional right, or otherwise to interpose millions of people here and make them in fact parties in an action like this?

Mr. Bleasé: Yes.

Judge Bone: You do.

Mr. Bleasé: Yes. I think it is an established constitutional law.

Judge Bone: You can include a great army of people who sit in the background and who refuse to take an active part.

Mr. Bleasé: I think there is a good reason for the Court doing this, and I think it is a reason that the Court might undertake to accept here as an additional reason for proceeding with this matter. These cases are mostly confined to cases involving First Amendment free [fol. 299] speech questions.

The reason that the Court has on numerous occasions permitted a party to an action to raise the rights of third parties is because of the crucial nature of the rights that are involved, and because in many of these instances the rights of these other people would simply never be raised or adjudicated apart from the Court's recognition of them in the case at hand. I think this is the kind of case which presents this kind of an issue.

Judge Bone: This is the first time that millions of people have been involved?

Mr. Bleasé: No.

Judge Bone: What other case that you can name where millions of people have been involved. You have used that term, "millions of people." Do you take it from the testimony of Mr. Abell?

Judge Zirpoli: I do not think he meant that millions of people are involved in litigation. I think he meant that millions might be affected.

Mr. Blease: Yes.

Judge Bone: That is what I am getting at, that they are affected to their disadvantage. Legally, constitutionally. That is plain enough, isn't it?

Mr. Blease: Yes.

[fol. 300] Judge Wollenberg: That is the inference they draw from Mr. Abell's testimony of the Post Office Department.

Judge Bone: I understand.

And upon this inference you want us to act and to lay down a firm ruling.

Mr. Blease: Upon this reason among many others.

Judge Bone: I would like to know what I am voting for in case a ruling is to be made.

Mr. Blease: The reason that the Court has taken this tact is that this is a fundamental tenant of our democratic society, embodied in an amendment to the United States constitution. They have expressed this in a variety of ways.

In fact, the whole panoply of legal theories, part of which are set forth in the legal memorandum are all various devices, ways, by which the Court has sought to minimize the impact of actions by the government upon freedom of speech and the recognition that in a complex society like ours that it is very easy to impede the free flow of information.

As a matter of fact, I can think of no other First Amendment case which has posed an interference of the magnitude of this case because of the numbers of people involved.

[fol. 301] Judge Bone: I cannot see why, in logic, wisdom and practice, you should not take this case to the Supreme Court as soon as you can get it there. I would like to expedite it as much as possible as one member of this Court.

Mr. Blease: Thank you.

Judge Bone: I would like to test out your theories in the Supreme Court. I would like to see just how far that Court might go in sustaining your views. That is my

private opinion. I am not expressing any opinion for my brethren. I am a member of another type of court.

Mr. Blease: I hope you will prevail upon the other judges.

Judge Bone: I do not know whether or not I can. I have known these gentlemen for a good many years, and I admire them very much. They have a right to their views, as any independent judge does on the court. You probably have evidence of that. They are not at all backward about asserting themselves.

Mr. Blease: If the Supreme Court should rule adversely in the Lamont case then we would have a delay of perhaps months during which time this program would continue.

Judge Bone: Since this presents a great crisis, [fol. 302] which you say it does, where millions of people's rights under the first amendment are involved, you as a patriotic American should be burning with zeal to get it into the Supreme Court.

Mr. Blease: Yes.

Judge Bone: Do you feel that way as a patriotic American?

Mr. Blease: Yes.

Judge Bone: That is right. I share your views. In fact, I would assist you in any way. I knew how to get it to that Court through this expediting court.

Judge Wollenberg: Gentlemen, shall we confer?

Judge Zirpoli: We might take a recess at this time.

All right. The Court will take a recess at this time.

(Short recess.)

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Zirpoli: Considering the posture of the case and the assurances of counsel that the evidence in the trial will be brief, the Court will proceed to have a trial of this cause. It may be that you will have to change the date because of pending trials.

What date do you suggest, Mr. Clerk?

The Clerk: September 25th, Friday. A week from this coming Friday.

[fol. 303] Judge Wollenberg: This is on the basis that it can be disposed of in one day.

Judge Zirpoli: We have your assurance, Mr. Blease, that the evidence should not take much more than half a day.

Mr. Blease: A day at the most.

Mr. Collett: If the Court please, I am not contemplating . . . What Mr. Abell has said, the Congressional Record is there, what more is there to say. You are giving him the opportunity. The one thing I would like the Court to do is to state something as to what framework any evidence is to be presented.

Judge Zirpoli: Mr. Blease, certainly the Court does not want you to give us what constitutes cumulative evidence. There is no need to present to this court something that is cumulative of some basic facts that may even be already stipulated to by the Government. So if you have that problem in mind, it can be terminated in one day.

(Conference among Court and Clerk.)

Judge Zirpoli: September 24th will be the trial date.

The Court should be furnished with a copy of the text of the hearing of June 19th and 20th, 1963 as soon as possible.

[fol. 304] Judge Wollenberg: Judge Zirpoli has warned about cumulative evidence. I think there is no problem about taking judicial notice of these Congressional hearings. I do not see how that could be avoided. Therefore, I do not think we need evidence that is simply corroborative of the statements made before the Committee.

Mr. Collett: I certainly do not see that I could be in any position of in any way controverting or say anything other than what appears in that record.

When I state that I think the Court should require Mr. Blease to essentially . . . that it be clear as to what evidence is to be introduced here.

Judge Wollenberg: Do you want to make a statement on that?

Mr. Collett: We have a specific case. Mr. Heilberg, on the complaint, the answers to the interrogatories, the testimony that was in the previous record, which is certainly before this Court. And if Mr. Blease feels that has to be introduced here, I would stipulate that what is now in

the record is a part of the record, which I think it is, certainly, already.

The interrogatories directed to Mr. Heilberg, I think that they are revealing to some extent as far as he personally is concerned.

I might point out that I would object to the [fol. 305] introduction of evidence at the time that it is introduced that goes beyond the issue that is framed by the complaint.

Now, if this Court is going to go on to the extent, as indicated by Mr. Blease, of bringing Mr. Wang in, who is a Customs employee, and bringing in mail handlers and so on, I am going to object to it. I do not think it has any materiality before this Court and I do not know whether this Court wants to hear that or, actually, what he expects to prove by it.

Maybe if he would make a direct statement to us now as to what he expects to prove by the individuals he has indicated to produce here, perhaps there is nothing that can be really controverted. They do what they do there and the implementation of the statute in accordance with the Customs regulations and the postal department. The instructions and so on, is something that we are not in any position to controvert. They do it the way they do it. It cannot be concealed. And whether that constitutes the basis for any further consideration by this Court, I do not know.

Judge Zirpoli: Your suggestion in effect is that you might be able to submit the case on the present record.

Mr. Collett: I think so, Your Honor. I do not [fol. 306] know whether there is anything more to be actually produced here before this Court.

Judge Zirpoli: Do you think there is any necessity of producing additional evidence?

Mr. Blease: Not if a few matters can be settled, one of which relates to the testimony which we had planned to offer, that people in fact had received these cards, that they had not returned them, and that they had not returned them because they feared that some consequences might flow having this card in the possession of the Government. I have three witnesses to put on relating to that merely to indicate that there are a number of people in this category.

Mr. Collett: Well, he says "this category," and he uses the word "fear." I do not know to what extent we are going to go into the matter of fear. Mr. Heilberg alleges fear. Taking his interrogatories, I do not see any basis . . .

Judge Wollenberg: He has already testified as to what he fears. Mr. Heilberg has been on the stand.

Mr. Collett: That is right.

Judge Wollenberg: What is added to this case by showing that three other people have similar feelings.

Mr. Blease: One, it will indicate that Mr. Heilberg's fears [fol. 307] are shared. Now, whether or not the fears are justified is another question. But to indicate that they are shared, that other people do feel the same way, and judging from that you can draw the inference that there are a substantial number of people in this position.

Judge Wollenberg: I think by the testimony before the Committee we know that there must be a substantial number of people who have received postal cards and who respond and who do not respond.

We have Mr. Heilberg's testimony of his civic feelings in the matter as far as fear is concerned.

How are you going to have any more to go to the Court?

Mr. Blease: If Your Honors feel the inferences are as good in the present record as it would be . . .

Judge Zirpoli: This is the decision that you make. We might feel that way, we may not. But you make the decision.

Mr. Blease: The purpose of putting on a postal handler is to, among other things, determine the extent of the delay, that is, how long, to get some feeling of the magnitude of the delay that is occasioned by the process as described. Beyond that, it probably would be mostly corroborative in San Francisco. And to show the same circumstances existed on the date of the hearings.

[fol. 308] Judge Zirpoli: Didn't you make the observation that in the statement of Mr. Abell it shows the delay?

Mr. Blease: Yes.

Judge Zirpoli: If your position is correct, as a matter of law isn't that delay adequate in itself?

Mr. Blease: I think it would.

Judge Zirpoli: Do you think you would need additional proof?

Judge Wollenberg: You are going beyond your basic claim here as far as the unconstitutionality of this section on its face showing its operation. Its operation, that is on the basis that it starts out on unconstitutional grounds.

Mr. Blease: That it is unconstitutional on its face and as applied.

Judge Wollenberg: Yes.

Judge Zirpoli: If the Court finds it is unconstitutional on its face, you need not look further.

Mr. Blease: That is right.

Lastly, we want to demonstrate that in the classification process, one, they classify certain publications, periodical publications, newspapers, and others, as Communist political propaganda, and that thereafter with respect to these publications all future items of that publication are classified without further inquiry.

Judge Wollenberg: Isn't that in the Congressional hearing?

Judge Zirpoli: That is in Mr. Abell's testimony, isn't it? Doesn't he make a reference to publications?

Mr. Blease: They have listed these publications without indicating dates.

If you are willing to stipulate that that is the case, there would be no need to demonstrate that.

For example, the Peking Review. Every issue of the Peking Review is classified as Communist political propaganda without regard to what is contained in any specific issue.

Mr. Collett: Well, at the moment I do not know whether that is actually so. But I do not think that issue has been framed before this Court.

Judge Zirpoli: Let's put it down for September the 24th at 10:00 a.m. It is obvious to counsel that it is not necessary to take more than one day on both sides to make this record.

Mr. Blease: We will make a determined effort to see if all of it can be settled prior to that time.

Judge Wollenberg: Yes, see if you can. You can advise one of us and we will mark it submitted.

Mr. Collett: Your Honors, the constitutionality [fol. 310] of the section is one thing. And if, then, you are branching off to whether or not the manner in which

that statute is actually administered is by means that are unconstitutional, you are off completely in another field, and that was not the case that was presented here by the original complaint that was filed. The complaint clearly challenges the statute of being unconstitutional. I do not see how you are going to get into the matter of the extent to which individuals have been, say, trained, or the Civil Service Commission has upon a job description appointed certain people with certain language background, and the extent to which when mail comes in, and there is a question about it, that it may be referred to Mr. Fishman, who was the general counsel, for ultimate determination, as to whether this piece of literature, magazine so on, is to be characterized as a Communist propaganda in the opinion of this Court, that is a matter that has been relegated to the administrative for determination.

Mr. Blease: The issues tendered by the complaint, whatever that complaint says, and I think it can be read as saying that we are challenging the statute on its face and as applied. We did raise one factual issue with regard to the working process, which is the method of applications, [fol. 311] in the pleadings. But beyond that there have been events subsequent to the original pleadings, part of which were as a result of action by the Government.

Judge Zirpoli: That only goes to the question of whether we have a controversy.

Mr. Blease: That is right. But the pleadings that have been framed in this case constitute the original pleadings plus these additional matters that occurred subsequently.

Judge Zirpoli: If this Court were to say contrary to the views expressed in the Lamont case the Court feels that under the circumstances existing here we have a genuine controversy and we will now look at the statute to determine whether in our view the statute is unconstitutional. If we find it constitutional, that ends the matter. If we find it unconstitutional, then, some question might arise as to whether we should be obligated to look into the question of the application of the statute. If we feel the evidence is insufficient for such purposes, there is no reason why we cannot ask for further hearing.

Mr. Collett: That is a fairly clear statement, Your Honor. Of course, if you were looking at it from the origi-

nal posture of the case, the case would set forth the statute [fol. 312] and then would make the necessary allegations which constitute the charge that the administration of it is in an unconstitutional manner.

The Parker versus Lester case was probably, I think, a clear example of that particular approach to it.

Judge Zirpoli: We do have to decide whether there is a controversy because you have raised that.

Mr. Collett: Of course you do. That matter is still there. That matter is still there, as to whether there is a controversy. If you say that there is a controversy, then, the next question is whether the statute is constitutional. But this enlarges, expands, and my objections, in the first instance, to the materiality of the interrogatories which were proposed was on that ground, that the issue before this Court is, first, whether or not there is a controversy, a substantial question and, then, is the statute constitutional.

Judge Zirpoli: The only thing is, you are asking the Court to determine on discovery, what was proper discovery, a situation which relates to the actual admission of that which was discovered. There is a difference between discovery and admission into evidence.

Mr. Collett: Certainly. I will recognize that this is a matter of the judicial determination.

Judge Zirpoli: Very well, we will continue the [fol. 313] matter until September 24th at 10:00 a.m. for trial or submission.

Mr. Blease: Thank you.

Mr. Collett: Thank you.

[fol. 314] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Before: Hon. Homer T. Bone, Judge, Hon. Albert C.
Wollenberg, Judge, Hon. Alfonso J. Zirpoli, Judge.

No. 41,660

LEIF HEILBERG, Plaintiff,

vs.

JOHN F. FIXA, et al., Defendants.

Transcript of Hearing—September 24, 1964

APPEARANCES:

For the Plaintiff: Coleman Blease, Esq.

For the Defendants: Cecil F. Poole, Esq., United States
Attorney. By: C. Elmer Collett, Esq., Assistant U. S.
Attorney.

[fol. 315] The Clerk: Heilberg versus Fixa. Counsel,
state your appearances for the record, please.

Mr. Collett: Elmer Collett, of the U. S. Attorney's Office,
for the defendant.

Mr. Blease: Coleman Blease for the plaintiff.

COLLOQUY BETWEEN COURT AND COUNSEL.

Judge Zirpoli: All right. As I understand it, gentlemen, all the evidence that is to be presented to the court is now before it?

Mr. Blease: Yes, that's correct.

Judge Zirpoli: All right.

Mr. Collett: That includes the answers to the interrogatories of the plaintiff. The only thing with regard to the evidence that I think I probably should state at this moment, which was made before, is that with regard to the interrogatories directed to the defendants Browkaw and Fixa, that the objection as to their materiality is in the record.

Judge Zirpoli: Yes.

Mr. Collett: That they are immaterial, that the issue framed here is the constitutionality of the statute, and that if it's assumed that the statute is constitutional, then matters which might pertain to whether or not the means in which the Executive Department implements the statute by executing it in an unconstitutional manner is not; that [fol. 316] it's the constitutionality of the statute which is before this court. So let the record show that that objection is there.

Incidentally, as far as the answers—

Judge Zirpoli: I mean, that is your position.

Mr. Collett: Yes, that's right. But I want the record to show—

Judge Zirpoli: The constitutionality and the application is left before the court.

Mr. Collett: Yes. I want the record to show that the objection is made, that the record is not devoid of some objection having been made to the materiality on that ground. The other thing is that there were objections to Heilberg's responses or to the interrogatories which were propounded to the plaintiff on the ground of materiality, likewise. Now, that was not ruled upon by a three-judge court. He didn't answer all the interrogatories that were there, but at the moment I don't see any particular point in making any issue of that before this court, although I think perhaps the answers to one of those interrogatories might have been of some interest to the court. The amount, the number of pieces of mail which he has received, and from how many countries, and also what his educational background might have been, it seems to me, is within the contentions that have been made here, is within, some [fol. 317] what, the framework, and has some materiality. But other than that, I think that unless Mr. Blease has more to present, although he has served this morning a memorandum on the evidence, what we will request is adequate time in order to respond and see that the matter is fully briefed as far as the court so desires.

Judge Zirpoli: How much time do you want, Mr. Collett?

Mr. Collett: Well, perhaps Mr. Blease—I think—is going to file further memorandum. Are you?

Mr. Blease: Not unless the court has any questions regarding any specific matters.

Judge Wollenberg: Are you filing a new memo this morning? Maybe you had better let that be done first and then find out about the answers.

Judge Bone: Ask if this is the memorandum.

The Clerk: I think this is counsel's memorandum on the evidence. Is that right?

Mr. Blease: Yes, that's right.

Judge Bone: All right.

Judge Wollenberg: The date is September 24th. That's it.

Judge Bone: Oh, yes, I see. There are duplicates.

Mr. Collett: Well, then, I understand that on your pre-trial statement and brief and your memorandum on the legislative history and this memorandum on the [fol. 318] evidence, this constitutes fully your opening presentation?

Mr. Blease: That's right.

Mr. Collett: Very well. Well, then—

Mr. Blease: Unless there are any questions which the court would want to have specifically briefed. Then this would constitute . . .

Judge Bone: There is one thing. The inordinate curiosity which plagues me all the time assails me now. I assume that you and our Brother Collett would probably be convinced, regardless of how this case might go, that you folks wanted it in the Supreme Court for a decision?

Mr. Blease: Yes.

Judge Bone: Would that be a fair assumption, Mr. Collett?

Mr. Collett: Well, certainly Mr. Blease has very definitely committed himself that way.

Judge Bone: At least your office wouldn't be plagued with this issue.

Mr. Collett: As was indicated the last time the court was listening to the matter, there is no question that the Corliss Lamonte case is in the Supreme Court, and as far as I can see, whatever issues are raised in this case are in that case, and the matter is before the Supreme Court. So that—

[fol. 319] Judge Bone: You know, we have to guess at

what the Supreme Court might do. But I assume that you folks wouldn't want this thing to stop at this point, in any event.

Mr. Collett: I would assume that if there was a decision in this case adverse to the defendants, that the Solicitor would probably authorize an appeal. I say that—

Judge Bone: Well, Mr. Blease at least would want to have this thing settled one way or the other for his client. You don't want to be left dangling in mid-air like Mohammed's—

Mr. Blease: That's right, Your Honor.

Judge Bone: You want this thing cleaned up. I am using vulgarisms now, but then you gentlemen will all understand it. We are all in the same business.

Mr. Blease: There is one minor item that might be just briefly cleared up. In one of the allegations of fact surrounding the means by which Mr. Heilberg's name was placed upon the list, we have drawn the inference, based upon the card that we submitted that was missent to Mr. Heilberg, it was originally addressed to the post office in New York and we have inferred from that that that was the method which the Post Office Department used by way of carrying out their letter directed to him saying [fol. 320] that his mail—

Judge Zirpoli: Well, Mr. Collett has never disputed that, anyway.

Mr. Blease: No.

Mr. Collett: I don't think there has been any variance as far as the sending out of that card, in any case, the New York case or here. Again it's stated the same procedure was resorted to in those other cases. The letters went from the Postal Department to the individual; that is, mail would be sent to him on the basis of his having filed the complaint. The only thing, to again state what I think is clearly in the record, is that when the complaint was filed I read the statute and I read the complaint, and the statute said that if the individual was determined to and desired to receive it, why, he should receive it. The complaint alleged that he desired to receive it, so I gave it to him. So on the basis of that, it seems to me to be a rather simple process as far as what the statute held.

Now, the contention here as to the constitutionality of

the statute, I mean that's something else again. But as far as the taking the wording of it, I didn't feel that it was necessary to get into any elaborate, esoteric conversation on what the word we desire might be. If he desired to receive it, he got it, period. Now, why, if [fol. 321] that is not proper, this court can determine that. But that was the simplicity in which I viewed it, and apparently the Postal Department, on the basis of the filing of the complaint that the individual desired it—they considered that the same way. In the Los Angeles case and the two New York cases, he was given the mail and the card was apparently filed and he received each of the—each of the individuals received the mail thereafter. So I don't see any question about if they missent it in the first place, why, it was sent again. But I don't know if there is any factual issue with regard to that.

Furthermore, I don't think that that's necessarily the issue that's before the court. I again refer that I think that goes to the manner in which the statute is implemented and whether or not it is implemented in an unconstitutional manner—that's something else again—assuming that the statute is constitutional. If it's constitutional, it's incumbent upon the Executive Department, the Post Office and the Treasury Department to execute it, as the Executive Department has to execute all statutes.

Judge Bone: Would you be willing to agree that you folks have a record here that ought to enable the Supreme Court to decide things like that?

[fol. 322] Mr. Blease: Yes.

Mr. Collett: Well, Mr. Blease says so. As far as I can see, everything that should be here—

Judge Bone: Well, if you want to go to the Supreme Court, I imagine my young brother here is agile enough to get that point before the court.

Mr. Collett: I think probably so.

Judge Bone: The statute on its face, whether it's unconstitutional.

Mr. Collett: It seems to me so. I mean, the record of the hearings is there. You have got that before you. The additional record of last year is there; there's no question that the Customs, the Treasury Department and the Post Office proceeded to endeavor to implement the execution of

the statute, and the answers to the interrogatories, by each of them, are there, although, as I say, for the record, the materiality of those—the answers to the interrogatories and the interrogatories—is challenged on the grounds as to what actually is before the court. It's the constitutionality of the section which I believe is the issue which is apparently, or has been, an issue with the attorneys representing the plaintiff in this case for some time, and they have been seeking to get at this particular type of [fol. 323] statute, and he has made a number of references to a work on censorship, Paul and Schwartz there, which I haven't read, but apparently you can get pretty well involved on the constitutionality under the First Amendment of this type of statute.

Now, whether there is any sound basis ultimately in the mind of the Supreme Court, I don't know. But in any event, it's before the Supreme Court in one case and undoubtedly they will also have this case to consider.

Judge Bone: Well, judging from the past action, if this case is promptly filed, they will withhold judgment in this case and decide both of them at the same time.

Mr. Collett: Well, I don't know that.

Judge Bone: I have seen that done frequently.

Mr. Collett: Could be.

Judge Bone: We have a case pending in my court now in which we are doing the very same thing. We should not permit ourselves to get off on the wrong foot with two cases coming up in two district courts here when we can decide both of them in one case, and at least partially eliminate some of the litigation.

Judge Wollenberg: I take it the matter is submitted?

Mr. Collett: I take it the matter is submitted, yes.

Judge Zirpoli: What time did you want to file [fol. 324] briefs?

Mr. Collett: So long as this is it, now, the Department requested that I ask the court for 60 days to respond to all this material. Now, whether or not that's a reasonable request in view of what the court has just said and Mr. Blease's intention, I am not sure. But I would ask for at least 30 days.

Mr. Blease: May I suggest, it took me two days to read the hearing and prepare the memorandum on the evidence.

Judge Bone: How about the docket of the Supreme Court? Are you gentlemen well aware of the procedure up there, to know what it might do if we introduced this delay into the case?

Mr. Collett: Well, I mean, introduce the delay . . .

Judge Wollenberg: I think we should try to get it in as expeditiously as possible, don't you?

Judge Bone: We are desirous of expediting it.

Judge Zirpoli: Mr. Collett obviously wants to file some brief on behalf of the Government.

Judge Wollenberg: Oh, yes.

Judge Zirpoli: What is a reasonable time for you to get this in, Mr. Collett? That seems to be the problem now. You have asked for 60 days. I think that you yourself [fol. 325] have recognized that 60 days, in the light of the posture of the case, is unreasonable.

Mr. Collett: Well, I think it is. I am just saying that the Department, of course, ultimately is going to have the responsibility of this case. There is a motion for summary judgment before the court.

Judge Wollenberg: They have had the benefit of two other cases. Could you get this in in about two weeks?

Mr. Collett: Well, whatever the court says. I will pass that word on. There is a motion for summary judgment in which there is a large number of cases that are cited there, and I don't know that there are any additional cases necessary to be presented, but there is a number of things with regard to the memorandum on the evidence and on this legislative history which I think will call for a response. I think that that doesn't exactly get the correct posture, and with regard to the evidence, I think it will call for some comment.

Judge Bone: Well, your office in Washington ought to have a very complete record on it.

Mr. Collett: That's right. I am sure they do.

Judge Wollenberg: Let's put it down for the 8th, and if it is impossible, they can make application to one of us and we can act.

Mr. Collett: That's agreeable.

[fol. 326] Judge Zirpoli: Yes, that's all right. For the filing of the brief and submission on September 8th. No, October the 8th.

Judge Bone: I think that will probably hustle things along in Washington.

Mr. Collett: Yes, I think probably we can hustle along on that basis.

Judge Wollenberg: You may want to reserve time to respond, Mr. Blease? Or is this submission—

Mr. Blease: Well, let me make that decision when it is submitted. If time is required, I can assure you that it will take no longer than two days. All these matters are spread in these documents; it's just a question of reading them.

Judge Wollenberg: Well, then in order that we don't continue the formal submission, let's add another week to that, make it October 15th for submission. Your brief is due, then, October 8th, Mr. Collett. Right, gentlemen? And then submission October 15th. If Mr. Blease decides before the 15th not to do anything, he can advise the court and we can order it submitted before the 15th. But at least you have that full week in which to file a brief.

Judge Bone: We can at least try to get away from road-blocks on the way.

Judge Wollenberg: All right.

Mr. Blease: May I just say one word about the [fol. 327] factual posture of this case? Up until this point it has been the position of the Government they were going to avoid meeting the central issues by mooting the case and therefore they have presented virtually no evidence at all; virtually all the evidence has been presented by us in one form or another. We have asserted in our legal argument that the Government does bear burdens, although in the alternative we have attempted to meet the burdens, even assuming that the burdens were reversed. The Government has made no assertions with regard to the purpose of this statute, the alternative or anything else of that nature. We have attempted to counter every conceivable assertion that might be made in that matter, and I believe all that is covered in the—

Judge Zirpoli: Well, do you feel this court must decide, number one, whether we still have a general controversy; number two, if we do, is the statute constitutional; number three, if the statute is constitutional, that should end it and we shouldn't have to be discussing the questions of

the application of the law? If we decide that, it is constitutional, then we can take a look at the question of whether it is unconstitutional in its application.

Judge Wollenberg: Sure. We don't have to go into it, then.

[fol. 328] Mr. Collett: One thing. That *McReynolds* case in New York versus *Christenberry*, the Postmaster and the Postmaster General, I don't think—you may not have copies of that, so I had mimeographed or photocopies made for the court.

Judge Wollenberg: That can be put in the file.

[fol. 329] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

No. 41660

[Title omitted]

ORDER ENJOINING DEFENDANTS—November 17, 1964

Before Bone, Circuit Judge, Wollenberg and Zirpoli,
District Judges.

Per Curiam

In this action plaintiff seeks to enjoin the enforcement of 39 U.S.C., § 4008, a statute which regulates the mailing of "communist political propaganda", and an order declaring it unconstitutional. This Court was convened pursuant to 28 U.S.C., § 2282, § 2284. Based on the record made at the hearing on the merits and facts established at prior pretrial proceedings before this Court, including the hearing on defendants' motion to dismiss which was denied, we hold that 39 U.S.C., § 4008 is unconstitutional on its face, as it infringes plaintiff's rights under the First Amendment of the Constitution of the United States, and defendants are enjoined from enforcing this statute.

In order to disclose the constitutional infirmities of

[fol. 330] the statute at issue, it is necessary to describe briefly its operation. Upon a determination by the Secretary of the Treasury that unsealed mail originating in a foreign country is "communist political propaganda", as defined in 22 U.S.C., § 611 (j), The Foreign Agents Registration Act of 1938 as amended, the Postmaster General is authorized to detain the mail upon its arrival for delivery in the United States. The addressee may receive the mail if it was sent pursuant to a subscription or it is ascertained by the Postmaster General that the mail is "desired by the addressee". Mail addressed to government agencies, certain educational institutions and mail governed by cultural exchange agreements is excepted from the operation of the statute.

To implement Section 4008 the Postmaster General and the Customs Bureau maintain eleven screening points in the United States for the interception of "communist political propaganda". The Customs Bureau decides which countries' mail is to be screened and examines such mail routed through the eleven screening points to determine whether it falls within the statutory definition. When it is determined that particular mail is to be classified "communist political propaganda", the addressee is mailed POD Form 2153-X identifying the mail and advising him that it will be destroyed unless he signifies a desire to receive it by returning the form appropriately marked. The addressee may signify a desire to receive the particular mail being detained or a desire to receive the detained mail and any similar publications. A file of cards is maintained of those individuals requesting delivery in the latter case. Thereafter, upon a determination that mail is "communist political propaganda", it is mailed to the addressee without further inquiry.

[fol. 331] In the instant case plaintiff received, on or about July 12, 1963, a letter from defendant Fixa containing POD Form 2153-X. The card notified plaintiff that the Post Office was holding a piece of unsealed mail matter entitled "A Proposal Concerning the International Communist Movement", which would be destroyed unless plaintiff returned the form appropriately marked within twenty days. Plaintiff refused to sign the card and instead filed this suit. Thereafter, the General Counsel of the Post

Office Department notified plaintiff that the filing of this suit constituted an expression of a desire to receive all mail that was and in the future would be detained under the provisions of Section 4008. In short, contrary to plaintiff's wishes, his name was placed on a list of those people desiring to receive "communist political propaganda".

Initially, defendants argue that this action has been rendered moot by the aforementioned action of the General Counsel of the Post Office. This same defense was raised, successfully, in *Lamont v. Postmaster General of the United States*, 229 F. Supp. 913 (1964). We cannot agree with that distinguished court. Plaintiff's mail is still subject to delay, since mail originating from designated countries must continue to be classified;¹ his name remains on the Postmaster's list of persons desiring to receive communist political propaganda; and there is no guarantee that this list will not be used to his detriment.

To render this case moot under these circumstances is to approve a device which would enable defendants to pre-[fol. 332] vent any potential recipient of mail originating abroad from ever testing the constitutionality of Section 4008. We are not persuaded that the doctrine of mootness requires this result.

It is a well established principle that the "... voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). Admittedly, the case may be nevertheless moot if defendant can demonstrate that the alleged wrong will not be repeated. But what is at issue here is by the very nature of the disputed statute a continuing act. Defendants are required by Section 4008 to continue to detain and classify mail which may be addressed to plaintiff in the future. The action of the General Counsel of the Post Office has caused plaintiff's name to be placed on a list which will continue to exist so long

¹ The *Lamont* court assumed, presumably on the record before it, that once the government agreed no longer to detain the plaintiff's mail, there would be "unimpeded delivery". *Id.* at 916. The record herein is clearly to the contrary.

as the statute is enforceable. These are the very practices which are at issue here, and plaintiff is entitled to have the legality of these practices litigated. See *United States v. W. T. Grant Co.*, *supra*, 632-633.

Furthermore, we think contrary to the court in *Lamont* that plaintiff may also assert the rights of third parties. Generally, a person cannot assert the constitutional rights of others. But this is merely a rule of practice which will not be applied where the fundamental constitutional rights of third parties may be denied and it would be difficult for the persons whose rights are asserted to maintain a suit in their own right. See *Barrows v. Jackson*, 346 U.S. 249, 255-257 (1953). Here, persons interested in receiving political matter from abroad may be deterred from bringing suit to challenge Section 4008, lest this be construed as an [fol. 333] expression of a desire to receive "communist political propaganda". The social stigma and economic injury they may suffer is very real. We do not think a person should be made to suffer social disapprobation in order to assert his constitutional rights.

Having satisfied ourselves that this action is not moot and that plaintiff has standing to sue, both in his own right and as a representative of third parties, we now turn to the constitutional issue.

The Constitution, Article I, Section 8, invests Congress with the power to regulate the postal system. See also *Ex parte Jackson*, 96 U.S. 727 (1877). But it is axiomatic that this power is not absolute and unfettered. Congressional power in this area is limited and conditioned by other provisions of the Constitution. Thus "... Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional". *Speiser v. Randall*, 357 U.S. 513, 518 (1958). See also *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 155-156 (1946). The apparent conflict between congressional power to regulate the postal system and its impotence to enact postal legislation which tends to inhibit or deter the exercise of First Amendment rights must be resolved by balancing legitimate legislative purposes served by the statute against the restrictions imposed on rights otherwise guaranteed by the First Amendment. See e.g. *Dennis v. United States*, 341 U.S. 494, 510 (1951); *Schneider v. State*, 308 U.S. 147 (1939).

In striking this balance we are mindful that First Amendment rights are not absolute, but it is too late in the day to doubt the preferred status these rights enjoy [fol. 334] in our constitutional scheme. See *Sherbert v. Verner*, 374 U.S. 398 (1963). The reasons for this preferred status were carefully explained by the Supreme Court in *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940):

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

In a recent elaboration of the so-called balancing test, the Supreme Court has indicated that only a compelling state interest could tip the scale in favor of a statute which burdens the exercise of First Amendment rights. See *Sherbert v. Verner*, 374 U.S. 398, 406. Moreover, even if a compelling state interest were shown, the burden remains on the state "... to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Sherbert v. Verner*, *supra*, at 407. With these considerations in mind, we turn now to the case at bar.

What injuries have been suffered by plaintiff? He asserts that his mail is subject to unnecessary delay because of the screening program made necessary by Section 4008. Whether this delay alone constitutes an unconstitutional abridgment of plaintiff's First Amendment rights, we need not decide. A more serious obstacle to the exercise of these rights arises out of the statute's requirement that the addressee of "communist political propaganda" indicate a "desire" to receive it. Apparently, the statute

[fol. 335] contemplates that once an addressee has manifested this desire to receive such mail, future "communist political propaganda", after it has been so classified, will not be further detained. This requires, of course, that the Post Office maintain a list of persons indicating a desire to receive this type of mail. The statute does not itself provide for such a list, but it is difficult to see how the program could operate otherwise. Indeed, the Post Office has initiated just such a procedure in the instant case. See also *Lamont v. Postmaster General of the United States*, *supra*, at 916. At a minimum plaintiff is required by the statute to disclose a desire to receive communist political propaganda.

The right to distribute and receive controversial literature may require constitutional protection where disclosure may subject the distributor or recipient to social disapprobation or economic injury. In *Talley v. California*, 362 U.S. 60 (1960), the Supreme Court had before it an ordinance requiring that handbills show the name of the distributor. The Court said: "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression", *Talley v. California*, *supra*, at 64. If identification of a distributor is constitutionally impermissible, a fortiori, identification of a recipient, whose rights are similarly protected [see *Martin v. Struthers*, 319 U.S. 141 (1943)], would no less "tend to restrict ... freedom of expression".

That a person may be reluctant to disclose his desires under the circumstances of this case is not fanciful. Similar lists under earlier non-statutory screening programs [fol. 336] were routinely turned over to the House Committee on Un-American Activities. See Hearings before the House Committee on Un-American Activities, 85th Congress, 2d session, p. 2794 (1958). Assurances by defendant that these practices have been discontinued cannot be reasonably expected to mitigate a person's reluctance to have his name associated with "communist political propaganda". There are no similar assurances that this information will not be made available in the future in view of the lack of a statutory requirement that information received pursuant to Section 4008 remain confidential.

Moreover, the practices made necessary by Section 4008,

we are convinced, cannot help but deter the free expression of ideas. It is a fact that people who associate themselves in whatever fashion with anything "communist" are very likely to suffer social disapprobation. See Judge Feinberg's dissenting opinion in *Lamont v. Postmaster General of the United States*, *supra*, at 921.

A reading of the legislative history² makes it abundantly clear that the purpose of the new legislation was primarily to control, restrict and prevent the delivery of matter found to be communist propaganda, an infringement upon the dissemination of ideas, and, therefore, a clear and direct invasion of First Amendment territory. To overcome this infirmity in the statute the government must assert and prove both that there is a compelling state interest and that no alternative remedy would [fol. 337] achieve the end desired without infringement. *Sherbert v. Verner*, *supra*, at 406-407. This the government has failed to do, for its alleged state interests, while "compelling" in theory, are insubstantial, illusory in fact and ignore available alternatives. They are clearly incompatible with the requirements of a free society.

The defendants have asserted as the purpose of Section 4008 that "the statute is designed to permit the non-delivery of large quantities of unsealed mail matter determined to be communist political propaganda which most people do not want to receive and which they should not be required to receive against their wishes" (emphasis added). In *Martin v. Struthers*, 319 U.S. 141 (1943), the Supreme Court held unconstitutional a handbill statute whose asserted purpose was to protect householders from annoyance and intrusion. The Court said:

Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time

²"Postal Rate Revision of 1962", Hearings before the Senate Committee on Post Office and Civil Service, 87th Congress, 2d Session (1962); "Exclusion of Communist Political Propaganda From The U.S. Mails", Hearings before the House Committee on Post Office and Civil Service, 88th Congress, 1st Session (1963).

and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors; that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas. (Id. at 146-147).

Even if this asserted purpose were to be found compelling, there is a readily available alternative which would protect the recipient's interest without infringing upon the free expression of others. The Federal regulations [39 C.F.R. 44.1(a)] provide that any person may authorize the postmaster to withhold the delivery of specifically described classes of foreign printed matter and to substitute his judgment as to classification for that of the addressee.

[fol. 338] Another purpose asserted for Section 4008 is that it is designed to avoid a taxpayer's subsidy for the delivery of communist political propaganda. Assuming that this purpose is other than an ill-concealed assertion of the right of the government to control, via the postal rates (see *Hannegan, supra*), certain political ideas which would run afoul of the First Amendment, it is evident that Section 4008 as applied does not and cannot accomplish this purpose. The evidence clearly shows that the administration of Section 4008 is far more costly than the direct delivery of the mail. In short, the statute imposes on the taxpayer an even greater subsidy. In any case, the taxpayer qua taxpayer does not pay for any portion of foreign mail sent from or received in this country. The government is authorized to adjust foreign mail rates so as to avoid any net cost to the taxpayer. See 39 U.S.C. § 505.

Finally, the government asserts in its trial brief that Section 4008 fulfills some objective of foreign policy or national security. No such purpose has been proved. The program instituted by Section 4008 is substantially the same as the administrative program discontinued by President Kennedy on March 17, 1961 after consideration of the national interest in foreign policy and national security. The legislative history reveals that except for minor dif-

ferences Section 4008 in effect reconstituted the discontinued program.

For the foregoing reasons this Court is satisfied that the asserted purposes of Section 4008 do not and cannot justify the burden placed on the First Amendment rights of plaintiff and members of the class he represents, and, therefore, we are compelled to declare the statute unconstitutional on its face.

[fol. 339] The Court having found that Section 4008 of 39 U.S.C. is unconstitutional on its face, hereby orders that the defendants, their agents and employees be and they are hereby enjoined from executing or enforcing the provisions of the aforesaid statute. Plaintiff shall prepare and submit an appropriate order.

Dated: November 17, 1964.

Homer T. Bone, United States Circuit Judge, Arthur C. Wollenberg, United States District Judge, Alfonso J. Zirpoli, United States District Judge.

[fol. 340] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41660

LEIF HEILBERG, Plaintiff,

vs.

JOHN F. FIXA, et al, Defendants.

JUDGMENT AND ORDER OF COURT—November 25, 1964

This Court, convened under the provisions of 28 U.S.C. 2282, 2284 to consider the constitutionality of 39 U.S.C. 4008, has filed its opinion holding Section 4008 unconstitutional.

Now, therefore, and pursuant thereto, It Is Declared that 39 U.S.C. 4008 is unconstitutional because it infringes plaintiff's rights under the First Amendment of the Constitution of the United States of America; and

It Is Ordered that each of the named defendants, their agents and employees are enjoined from enforcing or executing the provisions of 39 U.S.C. 4008.

It Is Further Ordered that plaintiff and all other persons have the right to receive and shall have delivered to them any and all mail addressed to them in the regular course of the post without said mail being processed pursuant to the provisions of 39 U.S.C. 4008.

11/25/64—300 to Collett, U.S.A.—2 copies to plaintiff's counsel and copies to Judges Bone, Wollenberg, and Zirpoli. [fol. 341] It Is Further Ordered that the defendants, and each of them, are enjoined from disclosing to any person or persons, or any agency or department of government, any and all lists, cards, or other documents, and any and all copies thereof, in the possession, custody or control of said defendants, or their agents or employees, which contain the names of addressees whom the Postmaster General of the United States, his agents or employees, have ascertained desired to receive mail classified pursuant to the provisions of 39 U.S.C. 4008.

Dated: November 25th, 1964.

Homer T. Bone, United States Circuit Judge, Arthur C. Wollenberg, United States District Judge, Alfonso J. Zirpoli, United States District Judge.

[fol. 342] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

DEFENDANTS' MOTION FOR ORDER STAYING ENFORCEMENT
OF FINAL JUDGMENT—Filed November 25, 1964

Come now the defendants by their attorneys and respectfully move this Honorable Court, pursuant to Rule 62(c), (d) and (e), of the Federal Rules of Civil Procedure, to issue an Order staying enforcement of the final

Judgment made and entered herein, November 25, 1964, holding unconstitutional 39 USC 4008, during the thirty (30) day period in which an appeal may be taken and, if an appeal be taken from said Judgment, during the pendency of such appeal.

Dated: November 25, 1964.

Cecil F. Poole, United States Attorney. By: /s/
Charles Elmer Collett, Assistant United States
Attorney, Attorneys for Defendants.

[fol. 343] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41660

LEIF HEILBERG, Plaintiff,

vs.

JOHN F. FIXA, et al, Defendants.

ORDER STAYING EXECUTION OF JUDGMENT AND ORDER OF
COURT—November 25, 1964

Upon application of counsel for defendants, and good cause appearing therefor, It Is Ordered that the judgment and order of this Court in the above cause is hereby stayed pending the filing, consideration and final disposition by the Supreme Court of the United States of any direct appeal to said Court to be made by the defendants herein, provided such appeal is filed in the Office of the Clerk of the Supreme Court of the United States on or before December 17, 1964.

Dated: November 25, 1964.

Homer T. Bone, United States Circuit Judge, Albert
C. Wollenberg, United States District Judge, Al-
fonso J. Zirpoli, United States District Judge.

11/25 copies sent.

[fol. 344] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

LEIF HEILBERG, Plaintiff,

v.

JOHN F. FIXA, individually and as Postmaster, San Francisco, California; JOHN A. GRONOUSKI, individually and as Postmaster General of the United States; GEORGE BROKAW, individually and as Collector of Customs, San Francisco, California; DOUGLAS DILLON, individually and as Secretary of the Treasury of the United States, Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed December 17, 1964

I

Notice Is Hereby Given that the defendants above named hereby appeal to the Supreme Court of the United States from the final Judgment and Order of Court, of the Three-Judge District Court, entered on November 25, 1964, holding that 39 U.S.C. § 4008 is unconstitutional, and enjoining the defendants from enforcing it:

This Appeal is taken pursuant to 28 U.S.C. § 1253.

II

The Clerk will please prepare a transcript of the appeal record of this cause, including this Notice of Appeal, for transmission to the Clerk of the Supreme Court of the United States.

[fol. 345]

III

The following questions are presented by this appeal:

1. Whether plaintiff's claim was moot.
2. Whether plaintiff had standing to challenge the constitutionality of 39 U.S.C. § 4008.

3. Whether 39 U.S.C. § 4008 is unconstitutional on its face, or as applied.

Dated: December 17, 1964.

J. Walter Yeagley, Assistant Attorney General,
Kevin T. Maroney, Chief, Appeals and Research
Section, Internal Security Division. /s/ Cecil F.
Poole, United States Attorney. /s/ Charles El-
mer Collett, Assistant United States Attorney,
Attorneys for the Defendants.

[fol. 346]. PROOF OF SERVICE (omitted in printing.)

[fols. 347-348] Clerk's Certificate to foregoing transcript
omitted in printing.

[fol. 349] SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

No. 848

JOHN F. FIXA, Individually and as Postmaster, San
Francisco, California, et al., Appellants,

v.

LEIF HEILBERG

Appeal from the United States District Court for
the Northern District of California

ORDER NOTING PROBABLE JURISDICTION—February 1, 1965

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar. This case is set for oral argument immediately following No. 491, which case is likewise placed on the summary calendar.

Mr. Justice White took no part in the consideration or decision of this case.

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No. 838

In the Supreme Court of the United States

October Term, 1954

JOHN F. AYER, INDIVIDUALLY AND AS PORTMASTER, SAN FRANCISCO, CALIFORNIA; JOHN A. GRONQUSKI, INDIVIDUALLY AND AS PORTMASTER, CHIEF OF THE UNITED STATES; GEORGE BROOKS, INDIVIDUALLY AND AS COLLECTOR OF CUSTOMS, SAN FRANCISCO, CALIFORNIA; DOUGLAS DILLON, INDIVIDUALLY AND AS SECRETARY OF THE TREASURY OF THE UNITED STATES, APPELLANTS

VERSUS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

JURISDICTIONAL STATEMENT

APPEALERS

Attorneys General

WALTER TRACY

Assistant Attorney General

KEVIN E. HADLEY

Attorneys

Department of Justice

Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. —

JOHN F. FIXA, INDIVIDUALLY AND AS POSTMASTER, SAN FRANCISCO, CALIFORNIA; JOHN A. GRONOUSKI, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES; GEORGE BROKAW, INDIVIDUALLY AND AS COLLECTOR OF CUSTOMS, SAN FRANCISCO, CALIFORNIA; DOUGLAS DILLON, INDIVIDUALLY AND AS SECRETARY OF THE TREASURY OF THE UNITED STATES, APPELLANTS

v.

LEIF HEILBERG

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court (App. *infra*, pp. 8-18) is not yet reported.

JURISDICTION

The appellee instituted this suit to enjoin the enforcement of 39 U.S.C. 4008, on the ground

that the statute is unconstitutional, and a three-judge court was convened pursuant to 28 U.S.C. 2282 and 2284. The judgment of the district court, which held the statute unconstitutional and enjoined the appellees from enforcing it, was entered on November 25, 1964 (App. B, *infra*, pp. 19-20), and the notice of appeal was filed on December 17, 1964. The jurisdiction of this Court to review by direct appeal the decision of the district court is conferred by 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether appellee's suit is moot.
2. Whether appellee had standing to challenge the constitutionality of 39 U.S.C. 4008.
3. Whether 39 U.S.C. 4008 is unconstitutional on its face, or as applied.

STATUTE INVOLVED

Section 4008 of Title 39 United States Code (Supp. V) provides as follows:

- (a) Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be "communist political propaganda", shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered

only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

(b) For the purposes of this section, the term "communist political propaganda" means political propaganda, as defined in section 1(j) of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611(j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951 or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended.

(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material whether or not "communist political propaganda" addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government mails an equal amount of material for

delivery in any country described in subsection (b).

STATEMENT

The appellee instituted this action challenging the constitutionality of 39 U.S.C. 4008, a statute establishing certain postal procedures with respect to unsealed mail matter which, under Section 1(j) of the Foreign Agents Registration Act, 22 U.S.C. 611(j), constitutes "communist political propaganda" and which originates, is printed or otherwise prepared in a foreign country. Under the statute, which was enacted in 1962, 76 Stat. 840, the postal authorities are required to detain all such mail which is not furnished pursuant to subscription and which is not known to be desired by the addressee, and to deliver such mail only upon the addressee's request. In administering the statute, the Post Office detains any mail which comes within its terms¹ and sends to the addressee a notice identifying the material being detained and advising him that unless he requests delivery by returning the notice and checking the appropriate box, the mail will be destroyed. The Post Office keeps a file of the addresses of those who have expressed a desire to receive such mail in order to facilitate the distribution of this type of mail to willing recipients.

In July 1963 the postal authorities advised appellee that they were holding a piece of unsealed mail

¹ The determination as to what mail qualifies as "communist political propaganda," which the statute delegates to the Secretary of the Treasury, is made by the Customs Bureau of the Treasury Department.

matter entitled "A Proposal Concerning the International Communist Movement," which would be destroyed unless appellee within 20 days returned the notice appropriately marked. Appellee did not return the notice, but instead instituted the present action in the district court seeking delivery of his mail and an injunction against the enforcement of the statute. After the suit was instituted, the postal authorities informed appellee that they were treating the filing of the action as a request by him to receive all mail detainable under Section 4008, and delivered to him the mail that had been detained. On the basis of this action, the postal authorities then contended that the suit was moot. (App. A, *infra*, p. 10.)

A three-judge district court, rejecting the contention of mootness, held that Section 4008 is unconstitutional on its face, and enjoined its enforcement. The court ruled (App. A, *infra*, pp. 12-18) that the mail detention procedures under Section 4008 infringe rights protected by the First Amendment, and that the government had not shown either that the countervailing policy interests that the statute was designed to further were "compelling" or that "no alternative remedy would achieve the end desired without infringement" of constitutional rights. The court entered a broad order enjoining, among others, the Postmaster General and the Secretary of the Treasury "from enforcing or executing the provisions of 39 U.S.C. 4008" (App. B, *infra*, p. 19). The court has stayed the order pending the determination of this appeal.

THE QUESTION IS SUBSTANTIAL

This case involves the same issues as *Lamont v. The Postmaster General*, No. 491, this Term, in which probable jurisdiction was noted on December 7, 1964. In *Lamont* the district court held that a suit challenging the constitutionality of 39 U.S.C. 4008 was rendered moot by the postal authorities' releasing the mail that had been detained pursuant thereto, and the court therefore did not reach the constitutional question. In the present case, however, the district court—after holding that similar action by the postal authorities did not moot the suit (a ruling which, it recognized, conflicted with *Lamont*)—held the statute unconstitutional and entered a broad order enjoining the appellees from enforcing it. Since the injunction runs not only against the local postal and Customs officials in San Francisco, but also against the Postmaster General and Secretary of the Treasury, its effect is to enjoin the operation of the entire program which the statute establishes for the detention of mail containing Communist political propaganda.

A decision with such far-reaching consequences, resting upon a holding that an important federal statute is unconstitutional, plainly warrants plenary review by this Court. While the question may be reached in *Lamont*, it would seem appropriate for the Court, when it considers the issue, also to have before it the only district court decision holding the statute unconstitutional. Particularly in view of the broad injunction entered by the district court, we suggest that it would be desirable for the Court to note

probable jurisdiction in sufficient time to enable it to hear both this case and *Lamont* during the present Term. Counsel for the appellee in the present case has advised us that he will not oppose the noting of probable jurisdiction.

CONCLUSION

This case presents a substantial question of public importance. Probable jurisdiction should be noted and the case should be set for argument together with *Lamont*.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

KEVIN T. MARONEY,
Attorney.

JANUARY 1965.

APPENDIX A

In the United States District Court for the Northern
District of California, Southern Division

No. 41660

LEIF HEILBERG, PLAINTIFF

v.

JOHN F. FIXA, ET AL., DEFENDANTS

ORDER ENJOINING DEFENDANTS

Before BONE, *Circuit Judge*, WOLLENBERG and
ZIRPOLI, *District Judges*.

PER CURIAM

In this action plaintiff seeks to enjoin the enforcement of 39 U.S.C., § 4008, a statute which regulates the mailing of "communist political propaganda", and an order declaring it unconstitutional. This Court was convened pursuant to 28 U.S.C., § 2282, § 2284. Based on the record made at the hearing on the merits and facts established at prior pretrial proceedings before this Court, including the hearing on defendants' motion to dismiss which was denied, we hold that 39 U.S.C., § 4008 is unconstitutional on its face, as it infringes plaintiff's rights under the First Amendment of the Constitution of the United States, and defendants are enjoined from enforcing this statute.

In order to disclose the constitutional infirmities of the statute at issue, it is necessary to describe briefly its operation. Upon a determination by the Secre-

tary of the Treasury that unsealed mail originating in a foreign country is "communist political propaganda", as defined in 22 U.S.C., § 614(j), The Foreign Agents Registration Act of 1938 as amended, the Postmaster General is authorized to detain the mail upon its arrival for delivery in the United States. The addressee may receive the mail if it was sent pursuant to a subscription or it is ascertained by the Postmaster General that the mail is "desired by the addressee". Mail addressed to government agencies, certain educational institutions and mail governed by cultural exchange agreements is excepted from the operation of the statute.

To implement Section 4008 the Postmaster General and the Customs Bureau maintain eleven screening points in the United States for the interception of "communist political propaganda". The Customs Bureau decides which countries' mail is to be screened and examines such mail routed through the eleven screening points to determine whether it falls within the statutory definition. When it is determined that particular mail is to be classified "communist political propaganda", the addressee is mailed POD Form 2153-X identifying the mail and advising him that it will be destroyed unless he signifies a desire to receive it by returning the form appropriately marked. The addressee may signify a desire to receive the particular mail being detained or a desire to receive the detained mail and any similar publications. A file of cards is maintained of those individuals requesting delivery in the latter case. Thereafter, upon a determination that mail is "communist political propaganda," it is mailed to the addressee without further inquiry.

In the instant case plaintiff received, on or about July 12, 1963, a letter from defendant Fixa containing POD Form 2153-X. The card notified plaintiff that the Post Office was holding a piece of unsealed mail matter entitled "A Proposal Concerning the International Communist Movement", which would be destroyed unless plaintiff returned the form appropriately marked within twenty days. Plaintiff refused to sign the card and instead filed this suit. Thereafter, the General Counsel of the Post Office Department notified plaintiff that the filing of this suit constituted an expression of a desire to receive all mail that was and in the future would be detained under the provisions of Section 4008. In short, contrary to plaintiff's wishes, his name was placed on a list of those people desiring to receive communist political propaganda."

Initially, defendants argue that this action has been rendered moot by the aforementioned action of the General Counsel of the Post Office. This same defense was raised, successfully, in *Lamont v. Postmaster General of the United States*, 229 F. Supp. 913 (1964). We cannot agree with that distinguished court. Plaintiff's mail is still subject to delay, since mail originating from designated countries must continue to be classified; ¹ his name remains on the Postmaster's list of persons desiring to receive communist political propaganda; and there is no guarantee that this list will not be used to his detriment.

To render this case moot under these circumstances is to approve a device which would enable defendants

¹ The *Lamont* court assumed, presumably on the record before it, that once the government agreed no longer to detain the plaintiff's mail, there would be "unimpeded delivery". *Id.* at 916. The record herein is clearly to the contrary.

to prevent any potential recipient of mail originating abroad from ever testing the constitutionality of Section 4008. We are not persuaded that the doctrine of mootness requires this result.

It is a well established principle that the " * * * voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot."

United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953). Admittedly, the case may be nevertheless moot if defendant can demonstrate that the alleged wrong will not be repeated. But what is at issue here is by the very nature of the disputed statute a continuing act. Defendants are required by Section 4008 to continue to detain and classify mail which may be addressed to plaintiff in the future. The action of the General Counsel of the Post Office has caused plaintiff's name to be placed on a list which will continue to exist so long as the statute is enforceable. These are the very practices which are at issue here, and plaintiff is entitled to have the legality of these practices litigated. See *United States v. W. T. Grant Co.*, *supra*, 632-633.

Furthermore, we think contrary to the court in *Lamont* that plaintiff may also assert the rights of third parties. Generally, a person cannot assert the constitutional rights of others. But this is merely a rule of practice which will not be applied where the fundamental constitutional rights of third parties may be denied and it would be difficult for the persons whose rights are asserted to maintain a suit in their own right. See *Barrows v. Jackson*, 346 U.S. 249, 255-257 (1953). Here, persons interested in receiving political matter from abroad may be deterred from bringing suit to challenge Section 4008, lest this be construed as an expression of a desire to receive

"communist political propaganda". The social stigma and economic injury they may suffer is very real. We do not think a person should be made to suffer social disapprobation in order to assert his constitutional rights.

Having satisfied ourselves that this action is not moot and that plaintiff has standing to sue, both in his own right and as a representative of third parties, we now turn to the constitutional issue.

The Constitution, Article I, Section 8, invests Congress with the power to regulate the postal system. See also *Ex parte Jackson*, 96 U.S. 727 (1877).. But it is axiomatic that this power is not absolute and unfettered, Congressional power in this area is limited and conditioned by other provisions of the Constitution. Thus " * * * Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional". *Speiser v. Randall*, 357 U.S. 513, 518 (1958). See also *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 155-156 (1946). The apparent conflict between congressional power to regulate the postal system and its impotence to enact postal legislation which tends to inhibit or deter the exercise of First Amendment rights must be resolved by balancing legitimate legislative purposes served by the statute against the restrictions imposed on rights otherwise guaranteed by the First Amendment. See e.g. *Dennis v. United States*, 341 U.S. 494, 510 (1951); *Schneider v. State*, 308 U.S. 147 (1939).

In striking this balance we are mindful that First Amendment rights are not absolute, but it is too late in the day to doubt the preferred status these rights enjoy in our constitutional scheme. See *Sherbert v. Verner*, 374 U.S. 398 (1963). The reasons for this preferred status were carefully explained by the Su-

preme Court in *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940)-:

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. * * * Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

In a recent elaboration of the so-called balancing test, the Supreme Court has indicated that only a compelling state interest could tip the scale in favor of a statute which burdens the exercise of the First Amendment rights. See *Sherbert v. Verner*, 374 U.S. 398, 406. Moreover, even if a compelling state interest were shown, the burden remains on the state " * * * to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Sherbert v. Verner*, *supra*, at 407. With these considerations in mind, we turn now to the case at bar.

What injuries have been suffered by plaintiff? He asserts that his mail is subject to unnecessary delay because of the screening program made necessary by Section 4008. Whether this delay alone constitutes an unconstitutional abridgement of plaintiff's First Amendment rights, we need not decide. A more serious obstacle to the exercise of these rights arises

out of the statute's requirement that the addressee of "communist political propaganda" indicate a "desire" to receive it. Apparently, the statute contemplates that once an addressee has manifested this desire to receive such mail, future "communist political propaganda", after it has been so classified, will not be further detained. This requires, of course, that the Post Office maintain a list of persons indicating a desire to receive this type of mail. The statute does not itself provide for such a list, but it is difficult to see how the program could operate otherwise. Indeed, the Post Office has initiated just such a procedure in the instant case. See also *Lamont v. Postmaster General of the United States*, *supra*, at 916. At a minimum plaintiff is required by the statute to disclose a desire to receive communist political propaganda.

The right to distribute and receive controversial literature may require constitutional protection where disclosure may subject the distributor or recipient to social disapprobation or economic injury. In *Talley v. California*, 362 U.S. 60 (1960), the Supreme Court had before it an ordinance requiring that handbills show the name of the distributor. The Court said: "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression.", *Talley v. California*, *supra*, at 64. If identification of a distributor is constitutionally impermissible, a fortiori, identification of a recipient, whose rights are similarly protected [see *Martin v. Struthers*, 319 U.S. 141 (1943)], would no less "tend to restrict * * * freedom of expression".

That a person may be reluctant to disclose his desires under the circumstances of this case is not

fanciful. Similar lists under earlier non-statutory screening programs were routinely turned over to the House Committee on Un-American Activities. See Hearings before the House Committee on Un-American Activities, 85th Congress, 2d session, p. 2794 (1958). Assurances by defendant that these practices have been discontinued cannot be reasonably expected to mitigate a person's reluctance to have his name associated with "communist political propaganda". There are no similar assurances that this information will not be made available in the future in view of the lack of a statutory requirement that information received pursuant to Section 4008 remain confidential.

Moreover, in the practices made necessary by Section 4008, we are convinced, cannot help but deter the free expression of ideas. It is a fact that people who associate themselves in whatever fashion with anything "communist" are very likely to suffer social disapprobation. See Judge Feinberg's dissenting opinion in *Lamont v. Postmaster General of the United States*, *supra*, at 921.

A reading of the legislative history² makes it abundantly clear that the purpose of the new legislation was primarily to control, restrict and prevent the delivery of matter found to be communist propaganda, an infringement upon the dissemination of ideas, and, therefore, a clear and direct invasion of First Amendment territory. To overcome this infirmity in the statute the government must assert and prove both

² "Postal Rate Revision of 1962", Hearings before the Senate Committee on Post Office and Civil Service, 87th Congress, 2d Session (1962); "Exclusion of Communist Political Propaganda From The U.S. Mails", Hearings before the House Committee on Post Office and Civil Service, 88th Congress, 1st Session (1963).

that there is a compelling state interest and that no alternative remedy would achieve the end desired without infringement. *Sherbert v. Verner, supra*, at 406-407. This the government has failed to do, for its alleged state interests, while "compelling" in theory, are insubstantial, illusory in fact and ignore available alternatives. They are clearly incompatible with the requirements of a free society.

The defendants have asserted as the purpose of Section 4008 that "the statute is designed to permit the nondelivery of large quantities of unsealed mail matter determined to be communist political propaganda which most people do not want to receive and which they should not be required to receive against their wishes" (emphasis added). In *Martin v. Struthers*, 319 U.S. 141 (1943), the Supreme Court held unconstitutional a handbill statute whose asserted purpose was to protect householders from annoyance and intrusion. The Court said:

Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors; that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas. (*Id.* at 146-147).

Even if this asserted purpose were to be found compelling, there is a readily available alternative which would protect the recipient's interest without infringing upon the free expression of others. The Federal

regulations [39 C.F.R. 44.1(a)] provide that any person may authorize the postmaster to withhold the delivery of specifically described classes of foreign printed matter and to substitute his judgment as to classification for that of the addressee.

Another purpose asserted for Section 4008 is that it is designed to avoid a taxpayer's subsidy for the delivery of communist political propaganda. Assuming that this purpose is other than an ill-concealed assertion of the right of the government to control, via the postal rates (see *Hannegan, supra*), certain political ideas which would run afoul of the First Amendment, it is evident that Section 4008 as applied does not and cannot accomplish this purpose. The evidence clearly shows that the administration of Section 4008 is far more costly than the direct delivery of the mail. In short, the statute imposes on the taxpayer an even greater subsidy. In any case, the taxpayer qua taxpayer does not pay for any portion of foreign mail sent from or received in this country. The government is authorized to adjust foreign mail rates so as to avoid any net cost to the taxpayer. See 39 U.S.C. § 505.

Finally, the government asserts in its trial brief that Section 4008 fulfills some objective of foreign policy or national security. No such purpose has been proved. The program instituted by Section 4008 is substantially the same as the administrative program discontinued by President Kennedy on March 17, 1961 after consideration of the national interest in foreign policy and national security. The legislative history reveals that except for minor differences Section 4008 in effect reinstituted the discontinued program.

For the foregoing reasons this Court is satisfied that the asserted purposes of Section 4008 do not and cannot justify the burden placed on the First Amend-

ment rights of plaintiff and members of the class he represents, and, therefore, we are compelled to declare the statute unconstitutional on its face.

The Court having found that Section 4008 of 39 U.S.C. is unconstitutional on its face, hereby orders that the defendants, their agents and employees be and they are hereby enjoined from executing or enforcing the provisions of the aforesaid statute. Plaintiff shall prepare and submit an appropriate order.

Dated: November 17, 1964.

/s/ HOMER T. BONE,
United States Circuit Judge.

ALBERT G. WOLLENBERG,
United States District Judge.

ALFONSO J. ZIRPOLI,
United States District Judge.

APPENDIX B

In the United States District Court for the Northern
District of California, Southern Division

No. 41660

LEIF HEILBERG, PLAINTIFF

v.

JOHN F. FIXA, ET AL., DEFENDANTS

JUDGMENT AND ORDER OF COURT

This Court, convened under the provisions of 28 U.S.C. 2282, 2284, to consider the constitutionality of 39 U.S.C. 4008, has filed its opinion holding Section 4008 unconstitutional.

Now, therefore, and pursuant thereto, IT IS DECLARED that 39 U.S.C. 4008 is unconstitutional because it infringes plaintiff's rights under the First Amendment of the Constitution of the United States of America; and

IT IS ORDERED that each of the named defendants, their agents and employees are enjoined from enforcing or executing the provisions of 39 U.S.C. 4008.

IT IS FURTHER ORDERED that plaintiff and all other persons have the right to receive and shall have delivered to them any and all mail addressed to them in the regular course of the post without said mail being processed pursuant to the provisions of 39 U.S.C. 4008.

IT IS FURTHER ORDERED that the defendants, and each of them, are enjoined from disclosing to any person or persons, or any agency or department of

government, any and all lists, cards, or other documents; and any and all copies thereof, in the possession, custody or control of said defendants, or their agents or employees, which contain the names of addressees whom the Postmaster General of the United States, his agents or employees, have ascertained desire to receive mail classified pursuant to the provisions of 39 U.S.C. 4008.

Dated: November 25, 1964.

HOMER T. BONE,

United States Circuit Judge.

• ALBERT C. WOLLENBERG,

United States District Judge.

ALFONSO J. ZIRPOLI,

United States District Judge.

Office-Supreme Court, U.S.
FILED

MAR 3 1965

JOHN F. DAVIS, CLERK

Nos. 491 and 848

In the Supreme Court of the United States

OCTOBER TERM, 1964

**CORLISS LAMONT, DOING BUSINESS AS BASIC
PAMPHLETS, APPELLANT**

v.

THE POSTMASTER GENERAL OF THE UNITED STATES

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK**

JOHN F. FIXA ET AL., APPELLANTS

v.

LEIF HEILBERG

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

MEMORANDUM CONCERNING CHANGED CIRCUMSTANCES

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington, D.C., 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 491

**CORLISS LAMONT, DOING BUSINESS AS BASIC
PAMPHLETS, APPELLANT**

v.

THE POSTMASTER GENERAL OF THE UNITED STATES

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK**

No. 848

JOHN F. FIXA ET AL., APPELLANTS

v.

LEIF HEILBERG

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

MEMORANDUM CONCERNING CHANGED CIRCUMSTANCES

In these appeals, which involve the constitutionality of a statute providing for detention by the Post Office of "communist political propaganda" of foreign origin (39 U.S.C. 4008), the Court noted probable jurisdiction on December 7, 1964 (No. 491; 379 U.S.

926), and on February 1, 1965 (No. 848), and set the cases for argument together. *Lamont v. Postmaster General*, No. 491, is an appeal from a judgment of a three-judge district court in the Southern District of New York dismissing a complaint seeking declaratory and injunctive relief against further enforcement of the statute, on the ground that the case was rendered moot by an order of the Postmaster General directing that the plaintiff's mail not be detained in the future. *Fixa v. Heilberg*, No. 848, is an appeal from a judgment of a three-judge district court in the Northern District of California declaring the statute unconstitutional and enjoining its enforcement.

At the time when both these cases were decided in the district courts the Post Office Department's procedure for administering 39 U.S.C. 4008 was substantially as follows: Any mail of foreign origin which qualified as "communist political propaganda" was detained by the postal authorities, who then sent the addressee a notice identifying the detained matter and advising him that unless he requested delivery before a certain date by returning the notice and checking the appropriate box, the mail would be destroyed. The Post Office kept a file of the names and addresses of persons expressing a desire to receive such mail in order to enable it in the future to distribute this mail to willing addressees without the preliminary notice-and-return steps.

In both of these cases, the plaintiffs refused to return the notices and brought suit to enjoin the enforcement of the statute on the grounds of its unconstitutionality. In each instance, the Post Office

Department subsequently notified them that the institution of their suits constituted an expression of desire to receive "communist political propaganda" and that postal authorities had therefore been ordered to deliver such mail to them without preliminary detention. Asserting that this action by the Post Office Department rendered the suits moot since the plaintiffs could not thereafter be given any relief by a court order which they did not already enjoy, the government moved to dismiss each case as moot. The motion was sustained in the Southern District of New York (No. 491) but it was denied in the Northern District of California (No. 848). In moving for summary affirmance in No. 491, we contended that the district court's decision regarding mootness was correct, and in its order noting probable jurisdiction in that case, this Court directed the parties to discuss "the question of mootness as well as the merits of the case." 379 U.S. 926.

Reaching the merits of the constitutional issue in No. 848, the three-judge district court in that case held that the statute was unconstitutional largely on the premise that the administration of the statute required the Post Office Department to "maintain a list of persons indicating a desire to receive this type of mail," and that the availability of such a list to other government agencies would substantially deter addressees from exercising their constitutional rights to receive such mail. Jurisdictional Statement, No. 848, this Term, pp. 14-15.

Recently, after probable jurisdiction had been noted, the Postmaster General reviewed the procedure

for administering 39 U.S.C. 4008 and decided that, as a matter of internal administrative policy, it was desirable to abandon the practice of keeping card files of the names of persons who desired to receive "communist political propaganda." And while the government would not lightly alter the *status quo* in a matter pending before this Court, the considerations of policy were judged sufficiently urgent to require the immediate elimination of what might be regarded as a file of names of persons interested in "communist political propaganda" and were sufficiently persuasive to outweigh any embarrassment inherent in changing existing conditions. Accordingly, on March 1, 1965, the Postmaster General signed the Regional Letter which is reprinted at pages 7-9, *infra*, and which is to be distributed to Regional Directors and Postmasters within the Post Office Department. The letter alters the procedure followed in executing 39 U.S.C. 4008 in two respects which are material to these appeals: (1) Instead of treating the request by the recipient as a continuing request for the delivery of all such mail, the new procedure requires the Postal authorities to send a separate notification for each item as it is received, and the recipient to make a separate request for each item; (2) no list or file of persons requesting the delivery of such mail is retained by the Post Office Department. The effect of the former change is now to preclude any contention that these cases are moot, since it is clear that both plaintiffs will hereafter be required to return notices for each piece of "communist political propaganda" they wish to receive. On the other hand,

the abolition of any list or file of willing recipients makes the alleged inhibiting effect of the statute on First Amendment rights far less severe than it was under the former procedure.

Although the Post Office Department's change of procedure eliminates any ground for contending that the cases are moot and also alters the factual basis upon which the merits were presented to both district courts (and to this Court in the jurisdictional papers), the government is prepared to argue in this Court, without further delay, the merits of the constitutional issue as it is presented under the new procedures. If the Court should feel that it is more appropriate to remand the cases to the district courts—in No. 491 for consideration of the merits of the constitutional claim and in No. 848 for reconsideration of the constitutional challenge to the statute in the light of the new practice under which no record or list of persons requesting Communist political propaganda will be maintained (compare *Fortson v. Toombs*, No. 300, this Term, decided January 18, 1965; *Calhoun v. Latimer*, 377 U.S. 263)—we will take all necessary steps to expedite their disposition in the district courts and, if necessary, their representation to this Court upon the more complete record.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

MARCH 1965.

APPENDIX

POST OFFICE DEPARTMENT REGIONAL LETTER MARCH 1, 1965

Subject: Destruction of Records Relating to Delivery of Mail Containing Communist Political Propaganda.

I. Purpose

To provide for the immediate destruction of POD Forms 2153-X upon which addressees have indicated their desire to receive communist political propaganda.

II. Action Offices

Chief Postal Inspector.

Regional Directors at New York, New York; Atlanta, Georgia; Chicago, Illinois; Dallas, Texas; Seattle, Washington; San Francisco, California.

Postmasters at New York, New York; Miami, Florida; San Juan, Puerto Rico; Chicago, Illinois; New Orleans, Louisiana; Seattle, Washington; San Francisco, California; Los Angeles, California; Laredo, Texas; El Paso, Texas; Honolulu, Hawaii.

III. Background

Since January 7, 1963, the postmasters at the eleven offices mentioned in paragraph II have been sending to addressees of mail matter considered by Bureau of Customs to be communist political propaganda, POD Form 2153-X. On this form addressees are requested to indicate whether they desire to receive the mail matter mentioned. Upon receipt of this card by the postmaster it is appropriately filed for future refer-

ence solely for the purpose of eliminating the necessity of making subsequent contacts with the same addressee as additional mail matter arrives. Many addressees have objected to the maintenance of any such record.

IV. Statement of Policy

It has been decided that the Forms 2153-X returned to the eleven postmasters mentioned above will not in the future be retained in the files of the Department, except in those cases where the addressee indicates on the form that he does not desire to receive the specific items of mail mentioned or any other similar communist political propaganda. The Department will not, in the future, maintain any record of the wishes of those addressees who desire to receive communist political propaganda. This will require the eleven above mentioned postmasters to send inquiry cards to all addressees each time mail matter is received unless Form 2153-X is on file showing the addressee does *not* desire the specific item. Upon the return of the cards indicating that the addressee does desire to receive the mail matter mentioned, the mail matter will be delivered and the card promptly destroyed without record being made of its receipt.

V. Implementation of New Policy

Under the direct supervision of the Chief Postal Inspector, or his designee, the eleven postmasters in the offices mentioned in paragraph II will destroy all POD Forms 2153-X now maintained in their files and upon which the addressees have indicated that they desire to receive specified items of communist political propaganda.

The Chief Postal Inspector, or his designee, will report to the Postmaster General that he personally witnessed the destruction of all such cards and the number thereof destroyed.

Destruction of POD Forms 2153-X pursuant to this instruction will be accomplished no later than March 15, 1965.

/s/ JOHN A. GRONOUSKI,
Postmaster General.

LE COPY

Office-Supreme Court, U.
FILED

MAR 9 1965

JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1964

No. 848

JOHN F. FIXA, Individually and as Post-
master, San Francisco, California; JOHN
A. GRONOUSKI, Individually and as Post-
master General of the United States;
GEORGE BROKAW, Individually and as
Collector of Customs, San Francisco,
California; DOUGLAS DILLON, Individually
and as Secretary of the Treasury of the
United States,

Appellants,

VS.

LEIF HEILBERG,

Appellee.

APPELLEE'S RESPONSE TO MEMORANDUM CONCERNING CHANGED CIRCUMSTANCES

MARSHALL W. KRAUSE,

COLEMAN BLEASE,

503 Market Street,

San Francisco, California 94105.

LAWRENCE SPEISER,

1101 Vermont Avenue, N.W.,

Washington, D.C.,

Attorneys for Appellee.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 848

JOHN F. FIXA, Individually and as Post-
master, San Francisco, California; JOHN
A. GRONOUSKI, Individually and as Post-
master General of the United States;
GEORGE BROKAW, Individually and as
Collector of Customs, San Francisco,
California; DOUGLAS DILLON, Individually
and as Secretary of the Treasury of the
United States,

Appellants;

vs.

LEIF HEILBERG,

Appellee.

APPELLEE'S RESPONSE TO MEMORANDUM
CONCERNING CHANGED CIRCUMSTANCES

Appellee agrees that questions of mootness are
avoided by the regulatory changes which require (1)

the destruction of existing and future indications of a desire to receive "communist political propaganda", and (2) a separate election for each piece of mail alleged to fall within the statutory category. Nor would we wish to criticize the *ex parte* change in the *status quo* of this case, since we are convinced that the attempt to reduce certain dangers of this on-going program¹ is beneficial to the appellee and all other persons affected by the statute.

However, we are of the opinion that the changes made by the Postmaster General do not remove below the threshold of constitutional notice the dangers he has attempted to meet, nor do they deal with the other significant, justiciable issues of this case, which are squarely presented and now ripe for this court's decision.

**I. THE STATUTE STILL SUBSTANTIALLY DELAYS
THE DELIVERY OF MAIL.**

The administration of 39 U.S.C. 4008 requires a substantial delay in the delivery of most, if not all, foreign mail from at least 28 countries (R.163-164). The court below found that the delay in the delivery of appellee's mail was sufficient to give him standing to raise the constitutional issues.² In view of the de-

¹On motion of the government, the injunction against the operation of the screening program was stayed by the court below pending final disposition of this appeal.

²The court's opinion stated (R. 217): "Plaintiff's mail is still subject to delay since mail originating from designated countries must continue to be classified . . ." However, the court did not reach the question of whether the delay alone would make the program unconstitutional (R. 219).

cision in *A Quantity of Books v. Kansas*, 378 U.S. 205, and this Term's ruling on the Maryland motion picture censorship law, the crucial nature of delay need not be stressed.

The evidence in this case proves what the district court in *Lamont v. Postmaster General*, No. 491, this Term, failed to notice. This is, that the procedure followed in determining the desire of addressees to receive what has been classified as "communist political propaganda" necessarily results in a continuing delay in delivery of foreign mail. The delay will increase under the new procedures. Mr. Tyler Abell, Associate General Counsel of the Post Office Department, testified before a Subcommittee of the House of Representatives on the operation of 39 U.S.C. 4008 on June 19 and 20, 1963 (R. 41-42). He outlined its operation as follows: Once the Customs Bureau (of the Treasury Department) has decided what countries' mail should be screened, *all* mail from the designated countries is routed to one of eleven specially established screening points. Only at a screening point is the mail sorted and "exempt"³ mail, and sealed first class letters not subject to the terms of the statute, returned to the post office for delivery. Then each remaining piece of mail is examined. Then [quoting the answer to interrogatory No. 9 to defendant George K. Brokaw, Collector of Customs in San Francisco (R. 176)], "If from the addressee and the addressor, the

³"Exempt" means mail addressed to federal government agencies, public libraries, scientific or professional institutes, or an official thereof, and material forwarded pursuant to a reciprocal cultural international agreement. 39 U.S.C. 4008(c).

nature of the contents is already known, it is not opened and read. If the material is suspected, it is opened and read. The determination as to whether or not it is propaganda material is made by the Assistant Deputy Commissioner [of Customs] in *New York*." (Emphasis supplied.) Non-propaganda is then returned to the post office for delivery. Under the old procedure, if the addressee had a card on file expressing his desire to receive "communist political propaganda", the mail was delivered. If no card is on file,—and as to all "propaganda" under the new procedure—a notice is sent to the addressee that he must indicate that he desires to receive the mail, or it will be destroyed in 20 days. Thus, the statute results in some delay for all foreign mail, greater delay for foreign mail which is neither sealed, "exempt" or "propaganda", still more delay for mail which is "propaganda", and the destruction of mail which is unclaimed "propaganda."

What would seem to have been an attempt by Congress to minimize delay for material received by subscription, has been totally frustrated by an administrative interpretation set out as "Appendix A" to this Response. Congress said that detention "shall not be required in the case of any matter which is furnished pursuant to subscription . . ." [39 U.S.C. 4008 (a)]. But the post office requires proof from the addressee that he is a subscriber. See Appendix A. Under the new policy, since "the Department will not, in the future, maintain any record of the wishes of those addressees who desire to receive communist political propaganda" (Memorandum Concerning Changed

Circumstances, p.8), those subscribing to daily publications will have to return a card every day.

II. SECTION 4008 STILL DETERS THE EXERCISE OF FREE SPEECH AND PRESS.

The Memorandum of the Solicitor General commendably recognizes that the retention of a file of names of persons interested in "communist political propaganda" might deter the exercise of First Amendment rights. Indeed, the Solicitor concedes that even under the new policy the "alleged inhibiting effect on First Amendment rights" is only "far less severe" than it was under the former procedure. Appellee suggests that in measuring the effect of only the Post Office Department's change in policy on the operation of the Section 4008 program, the Solicitor has overlooked the evidence established in this case that the program is *jointly* operated by the Post Office Department and the Bureau of Customs.

Throughout the record in this case, there is a studied absence of any indication that the Bureau of Customs will treat the information its agents necessarily learn in the administration of Section 4008 with confidence. When the Associate General Counsel of the Post Office Department filed an affidavit with the court below concerning the confidentiality of the Post Office Department's card file formerly kept under Section 4008 (R. 156-157), the Bureau of Customs filed nothing. The Solicitor General's Memorandum indicates that the Postmaster General has taken further steps to protect the confidentiality of the mails,

but this only highlights the silence of the Secretary of the Treasury, also an appellant herein, and his failure to take comparable steps, though his agents have equal access to the information necessary to administer Section 4008.⁴

In short, in this joint operation where both Customs and Post Office personnel must work closely together, where Customs personnel must examine and classify every piece of mail which is not "exempt" or sealed, the Post Office Department has made efforts to preserve the confidentiality of the recipients of "propaganda," but the Bureau of Customs has made no effort whatsoever. *Yet it is the Customs officials who have misused similar information and provided the occasion for the fears expressed by addresses of material falling within the purview of Section 4008.*⁵

⁴The transcript (R. 112) shows the following testimony by appellant Fixa, the Postmaster of San Francisco: "Q. Is the card, 2153-X, filed in the same place, in the same cabinet or box, with the cards of other persons who have similarly expressed a desire to receive communist political propaganda? A. Yes, sir, they are all filed in alphabetical order. Q. Where is that file kept? A. It's in the Foreign Propaganda Unit. Q. And are there post office employees who have access to that list? A. Both post office and custom employees. *It's a joint operation.*" (Emphasis added.)

⁵Mr. Irving Fishman, Deputy Collector of Customs for New York, testified as follows before a House Committee concerning the predecessor to the Section 4008 screening program:

"Mr. Arens: You have given the Committee, in private session, lists in great volume of the recipients of this communist propaganda, have you not?

"Mr. Fishman: That is right."

Hearings Before the House Committee On Un-American Activities, 85th Cong., 2d Sess. 2794 (1958).

More recently Mr. Fishman testified: "[W]e have been instrumental in furnishing a great number of the intelligence fraternity with information on what is coming into the country. We have been able to keep for example, the Department of Justice, the

III. OTHER CONSTITUTIONAL ISSUES MAY BE DECIDED WITHOUT REMAND.

It has been appellee's position from the outset of this case that the First Amendment removes all power from the Federal Government to undertake a mail screening program based upon alleged propaganda content. The founders of this country did not leave power in the government to engage in such an activity, regardless of whether individuals are directly harmed by it or not. The factual finding of delay in mail delivery gives appellee standing to raise this issue.

The mere labeling of mail as "communist political propaganda" has an unconstitutional deterrent effect. Some, perhaps many, of our citizens will take this governmental judgment of worthlessness as final and make no further investigation. Others will find it unpatriotic to peruse what the government has told them is bad for them. The harm to free communication of ideas is real and direct.

Each time a Customs official must open and read a piece of mail addressed to a resident of this country under the Section 4008 program, he violates that resident's right to freedom from unreasonable searches and seizures. It is true that foreign mail may be in-

Foreign Agents Registration Section, aware of the activity of the foreign agents so that they can compare what we have given them with what the foreign agents report themselves each year, and we have been helpful to a great many other intelligence agencies." *Hearings Before a Subcommittee of the House Committee on Appropriations, Treasury-Post Office Departments and Executive Office Appropriations for 1964, 88th Cong., 1st Sess. 142 (1963).* See also R. 120-121, 134, 137, 139.

spected, but this is for the legitimate purpose of preventing smuggling and enforcing revenue laws, not for the illegitimate purpose of inhibiting First Amendment rights.

IV. CONCLUSION.

Appellee does not believe any further actions in the court below could shed more light on the constitutional issues now fully presented by this case. We recognize the significance of these issues and the delicacy of the rare—perhaps unique—situation where an act of Congress has been held to abridge Freedom of Speech and Press. We think that there is neither room nor reason for delay in the resolution of these issues, nor has the action of the Postmaster General lessened their importance.

Dated, March 8, 1965.

Respectfully submitted,

MARSHALL W. KRAUSE,

COLEMAN BLEASE,

LAWRENCE SPEISER,

Attorneys for Appellee.

(Appendix A Follows)

Appendix A

Post Office Department
Office of the General Counsel
Washington, D.C. 20260

In reply refer to
WFL:fr
42-A-4
February 25, 1965

Isidore G. Needleman, Esq.
165 Broadway
New York, New York 10038

Dear Mr. Needleman:

We are quite mindful of the provision in 39 U.S.C. 4008(a) that the detention-notice procedure "shall not be required in the case of any matter which is furnished pursuant to subscription"

We are also mindful that many foreign mailers of communist political propaganda place the notation "Subscription Copy" on unsolicited matter in an attempt to circumvent the application of the cited law. In view thereof, we would be remiss in our duty to the Congressional mandate to accept such notation without first seeking the addressee's delivery instruction. We certainly have no way of knowing whether any addressee is a bona fide subscriber to any particular matter without first having contacted him.

For the General Counsel:

Sincerely yours,

/s/ William F. Lawrence,
William F. Lawrance,
Associate General Counsel.

Nos. 491 and 848

MAR 22 1965

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964

**CORLISS LAMONT, DOING BUSINESS AS BASIO
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THE POSTMASTER GENERAL OF THE UNITED STATES

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
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JOHN F. FIXA ET AL., APPELLANTS

v.

LEIF HEILBERG

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

BRIEF FOR APPELLEE IN NO. 491 AND APPELLANTS IN NO. 848

ARCHIBALD COX,

Solicitor General,

J. WALTER YEAGLEY,

Assistant Attorney General,

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Assistant to the Solicitor General,

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Washington, D.C., 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 491

**CORLISS LAMONT, DOING BUSINESS AS BASIC
PAMPHLETS, APPELLANT**

v.

THE POSTMASTER GENERAL OF THE UNITED STATES

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

No. 848

JOHN F. FIXA ET AL., APPELLANTS

v.

LEIF HEILBERG

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

BRIEF FOR APPELLEE IN NO. 491 AND APPELLANTS IN NO. 848

OPINIONS BELOW

The opinions of the three-judge district court in No. 491 (L.R. 18-33) ¹ are reported at 229 F. Supp. 913.

¹ "L.R." refers to the record in No. 491. "F.R." refers to the record in No. 848.

The opinion of the three-judge district court in No. 848 (F.R. 215-223) is reported at 236 F. Supp. 405.

JURISDICTION

The judgment of the district court in No. 491 was entered on May 19, 1964 (L.R. 35-36), and a notice of appeal was filed on June 17, 1964 (L.R. 37-38). The judgment of the district court in No. 848 was entered on November 25, 1964 (F.R. 223-224), and a notice of appeal was filed on December 17, 1964 (F.R. 226-227). Probable jurisdiction in No. 491 was noted on December 7, 1964 (379 U.S. 926), and in No. 848 on February 1, 1965. The jurisdiction of this Court rests upon 28 U.S.C. 1253.

QUESTION PRESENTED

Whether 39 U.S.C. 4008, as presently administered by the Post Office Department and the Customs Bureau, violates the First, Fourth or Fifth Amendment of the Constitution of the United States.

STATUTES AND REGULATIONS INVOLVED

The statutes involved in this case are Section 305 of the Postal Service and Public Employees Salary Act of 1962, 76 Stat. 840, 39 U.S.C. 4008, and Section 1(j) of the Foreign Agents Registration Act of 1938, 52 Stat. 631, 22 U.S.C. 611(j). The regulations involved are Customs Regulation 9.13, 19 C.F.R. 237 (January 1, 1964), and Post Office Department Regional Letter, RL No. 65-38. The statutes and regulations are set out in the Appendix, pp. 33-41, *infra*.

STATEMENT

1. *The statute.*—Both these cases were instituted to test the constitutionality of a statute enacted in 1962 to establish certain postal procedures with regard to particular foreign mailings addressed to persons within the United States. The statute (pp. 33-34, *infra*), 39 U.S.C. 4008, requires the Postmaster General to detain and to deliver “only upon the addressee’s request” any mail having all of five characteristics: (1) unsealed; (2) originated, printed or otherwise prepared in a foreign country; (3) determined by the Secretary of Treasury to be “communist political propaganda”; (4) not furnished pursuant to subscription; and (5) not otherwise known to be desired by the addressee. The statute defines “communist political propaganda” in subsection (b) as material issued by or on behalf of any country with respect to which tariff concessions have been suspended or withdrawn or from which foreign assistance is withheld and which meets the definition of “political propaganda” provided in Section 1(j) of the Foreign Agents Registration Act of 1938. Subsection (c) of the statute exempts from its provisions any mail addressed to agencies of the United States Government and educational institutions and mail sent pursuant to a reciprocal cultural international agreement under which the United States sends an equal amount of matter to the country on whose behalf the “communist political propaganda” is issued.

The statute is currently administered by the Post Office Department and the Customs Bureau of the

Treasury Department as follows: The Customs Bureau initially determines which foreign countries meet the conditions prescribed in subsection (b).² All unsealed mail from those countries is then routed by the Post Office Department through one of ten screening points established by the Customs Bureau.³ At the screening points, exempt mail is sorted out by postal personnel, and it is immediately dispatched. The remaining mail is examined by Customs authorities to determine whether it constitutes "communist political propaganda" within the meaning of 39 U.S.C. 4008. Whatever mail matter is held not to be such propaganda is then dispatched, and what remains is detained by the Post Office Department to abide in instructions from the addressee.

The Post Office sends a notice to the addressee (Form 2153-X) advising him that he has received unsealed mail matter which has been determined to be

² The countries from which mail matter arriving in the United States is routinely screened are Albania, Bulgaria, Cuba, Czechoslovakia, Danzig, East Prussia, Estonia, Hungary, Indochina, Kurile Islands, Latvia, Lithuania, Outer Mongolia, Poland, Rumania, Southern Sakhalin, Tanna Tuva, Union of Soviet Socialist Republics, and Yugoslavia. Mail coming from parts of the following countries which are under Communist domination or control are also screened: Cambodia, China, Germany, Korea, Laos, and Vietnam. In addition, mail coming from Canada, Hong Kong, Japan and Mexico is made available to the Customs Bureau screening units. Hearings on *Exclusion of Communist Political Propaganda from the U.S. Mails* before the Subcommittee on Postal Operations of the House Committee on Post Office and Civil Service, 88th Cong., 1st Sess. (1963), p. 8.

³ The current screening points are: Chicago, El Paso, Honolulu, Los Angeles, Miami, New Orleans, New York City, San Francisco, San Juan, and Seattle.

communist political propaganda; and that it cannot be delivered unless the addressee wants it. The notice (L.R. 13; F.R. 10) identifies the mail matter received and requests the addressee to indicate, by checking an appropriate box, whether he wishes to have the mail delivered. The notice states that if no response is received within twenty days, it will be assumed by the Post Office Department that the addressee does not want the identified publication or any similar publication which may subsequently arrive.

Before March 1, 1965, it was the policy of the Post Office Department to provide a space on the card for an indication of the addressee's desire to have all similar publications delivered in the future. This required the Post Office to keep a current file of persons who had indicated a desire to receive such publications. In a Regional Letter dated March 1, 1965 (RL No. 65-38, pp. 39-41, *infra*), the Postmaster General terminated this practice effective no later than March 15, 1965. We have been advised by the Post Office Department that notices sent after March 15 offer an addressee the choice of having the particular item delivered or not, and permit him to leave standing instructions as to future similar publications only if his wish is not to have them delivered.⁴ We have also been advised that the revised notices to be issued under this changed procedure will inform addressees (1) that the Post Office will keep no record other than a list or file of those who, by returning

⁴The Post Office Department intends to retain its assumption that those who do not return the card want neither the identified publication nor any similar one arriving subsequently.

the notice or by silence, leave standing instructions not to have such mail delivered and (2) that the returned notice itself will be destroyed.

2. *District court proceedings.*—(a) No. 491—In July 1963, Dr. Corliss Lamont, who does business under the name "Basic Pamphlets" in New York, was notified by the Post Office Department under 39 U.S.C. 4008 that a copy of *Peking Review* #12 was being detained in San Francisco pending his instructions (L.R. 2, 10, 13). Dr. Lamont did not respond to the notice, but instead brought suit in the Southern District of New York to enjoin the enforcement of the statute and have it declared unconstitutional on the ground that it violated rights under the First and Fifth Amendments (L.R. 3, 10).

The Post Office Department thereupon notified Dr. Lamont that the institution of the suit was understood by the Department as "an expression of desire by Basic Pamphlets and you as owner and manager to receive all of your mail whether or not the Customs Bureau of the Treasury Department considers it to be Communist political propaganda" (L.R. 5). Accordingly, the Post Office advised, all mail being detained would be delivered immediately and no future mail addressed to Basic Pamphlets or to Dr. Lamont personally would be detained (L.R. 5-6). On the basis of this action by the Post Office Department, the government suggested that the case was moot (L.R. 14).

Dr. Lamont thereupon filed an amended complaint wherein he also alleged that the Post Office Department was keeping a list of those who had expressed a

desire to receive "Communist political propaganda" and sought to have his name removed from this list (L.R. 3-4). On Dr. Lamont's motion a three-judge court was convened (L.R. 7, 17-18). Cross-motions for summary judgment and for dismissal of the complaint were filed (L.R. 6, 17).

A majority of the three-judge court dismissed the complaint as moot (L.R. 19-30). It reasoned that as a result of the Post Office Department's treatment of Dr. Lamont's institution of suit as an expression of desire to receive such mail and the Postmaster General's order that Dr. Lamont's mail not be detained, there was no present controversy between the parties to the suit (L.R. 21-23). With respect to the claim that the Post Office's retention of a list presented a live controversy, a majority of the court held that the asserted danger of public disclosure was "largely speculative" and was "only an abstract possibility, not an immediate threat" (L.R. 25, 26). Hence it dismissed this aspect of the complaint as not ripe for adjudication (L.R. 27). Judge Feinberg dissented on the grounds that there was a sufficient question of fact regarding the likelihood of disclosure of the list to require denial of the motion to dismiss and that, in any event, Dr. Lamont was entitled to assert the rights of parties who would be afraid to bring suit (L.R. 31-33).

(b) No. 848—In July 1963, Leif Heilberg received Post Office Department Form 2153-X, which advised him that the Post Office was detaining one copy of a publication entitled "A Proposal Concerning The General Line of the International Communist Movement"

(F.R. 2-3, 10, 147-149). He thereupon instituted this action for a judgment declaring 39 U.S.C. 4008 unconstitutional and for an order enjoining the Postmaster in San Francisco, the Postmaster General, the Collector of Customs, the Secretary of the Treasury and their agents from enforcing the statute on the ground that the placing of his name on a list of persons willing to receive "Communist political propaganda" would stigmatize him and abridge rights guaranteed by the First Amendment (F.R. 3-4). He also alleged that the statute violated the Fifth Amendment in that it arbitrarily distinguished between persons like himself and educational and governmental institutions and because its standards for determining "communist political propaganda" were vague and uncertain (F.R. 7).

On September 16, 1963, the general counsel of the Post Office Department advised Heilberg by letter that the institution of his suit was considered by the Department to be an expression of desire to receive "Communist political propaganda" and that in the future no such mail addressed to him would be detained (F.R. 28-29, 31, 32). The government then filed a motion to dismiss the action on the ground of mootness (F.R. 35).

A three-judge court was empaneled, and after hearing arguments and testimony, it denied the motion to dismiss (F.R. 49-152). After interrogatories were submitted and answered by both sides (F.R. 158-161, 163-177, 178-180), the court held further hearings (F.R. 181-215) and then determined that the statute was unconstitutional on its face (F.R. 223). Re-

serving the question whether the delay in receipt of an addressee's mail under this statute alone infringes upon constitutional liberties (F.R. 219), the court held that the disclosure of identity required as a condition for receiving the mail amounted, in light of the Post Office's practice of keeping a list of willing addressees, to "an infringement upon the dissemination of ideas, and, therefore, a clear and direct invasion of First Amendment territory" (F.R. 221). The court held that this "invasion" was not justified by any compelling governmental interest and that there were alternative means for achieving the same result (F.R. 221-222). Consequently, it declared 39 U.S.C. 4008 unconstitutional under the First Amendment and enjoined its enforcement (F.R. 223-224).

ARGUMENT

Introduction and Summary

The present case, stripped of clichés and with broad abstractions reduced to concrete actualities, involves a very narrow question. Congress enacted Section 305 in the awareness that Communist political propaganda mailed to addressees in the United States on behalf of foreign governments was often offensive to the recipients and constituted a subsidy to the very governments which bar the dissemination of publications from the United States. Section 305, reduced to its simplest terms, represents a Congressional decision that the United States should not thus subsidize the delivery of the political propaganda of a foreign power when there is no reason to suppose that the addressee desires to receive it,

but that such mail should be made available, even at public expense, to those addressees who desire it. Accordingly, the statute calls for delivery of such mail whenever the Postmaster General has reason to believe that delivery is desired and, in other cases, directs him to ascertain and carry out the addressee's wishes. There is no censorship. There are no consequences except that delivery is suspended for a day or two while the addressee is put to the trifling task of marking a card if he wishes delivery.

We claim no support for this statute in large public interests such as would be needed to justify a true restriction upon freedom of expression or inquiry. There is no such restriction. The attack upon the statute reduces to the assertion that the United States has a constitutional duty to subsidize the plaintiff's receipt of propaganda from foreign countries which refuse reciprocal dissemination even though the plaintiffs have too little interest in the propaganda to request its delivery, and delivery to them would require affronting the sensibilities of other addressees opposed to distribution. The First Amendment imposes no obligation upon the federal government to subsidize such indiscriminate delivery of the propaganda of foreign powers.

The statute does not violate the Fifth Amendment. The definition of "communist political propaganda" is an adequate guide for administrative action. This is not a criminal statute which requires anyone at peril of life, liberty or property to speculate about its meaning.

The suggestion that a hearing is required is frivolous. There is no way in which a hearing could be held without detaining the mail for a brief period. Under the statute the mail must be, and is delivered, to any addressee who so requests as promptly as he could be given notice of a hearing and long before a hearing could be completed. Nor is there anything arbitrary in allowing distribution to educational institutions, libraries, scientific organizations and their personnel. The very nature of their activities indicates that they probably do desire the material for their own use or that of the public.

There is no search or seizure in violation of the Fourth Amendment. The examination of this third class mail is no different from the inspection required to determine whether it qualifies for such carriage. Requiring an addressee to indicate his desire to receive the mail does not force him to incriminate himself because the expression of such a desire would have no probative value in any imaginable prosecution.

I

THE STATUTE DOES NOT VIOLATE THE FIRST AMENDMENT

Although "grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever" (*Hannegan v. Esquire, Inc.*, 327 U.S. 146, 156), not every postal regulation can be automatically assimilated to a law abridging freedom of expression. For the relevant conditions and consequences of a postal regulation, as

well as its substance, may be quite unlike anything involved in the attempted regulation of speech or publication. The present case exemplifies important differences. When the clichés are stripped away and attention is focused upon the precise scope and consequences of Section 305, it becomes apparent that no large questions of freedom to speak or to hear, or of privacy or association, are presented.

One special circumstance involved in the carriage of the mails—often unimportant standing alone but sometimes material in conjunction with others—is the cost to the government. The taxpayers, through the government, are subsidizing the distribution of literature, propaganda and other writings whenever the Post Office carries mail at less than cost. That was one of the concerns of the sponsors of Section 305. *Postal Rate Revision of 1962*. Hearings before the Senate Committee on Post Office and Civil Service, 87th Cong., 2d Sess. (1962) (hereinafter *1962 Senate Hearings*), pp. 842-843, 918-919, 930.

Second, in this case the senders of the mail are not persons with rights under the First or Fifth Amendments. The mail comes from overseas. The senders are foreign governments or persons acting on their behalf. Section 305 applies only to matter prepared in a foreign country and "issued by or on behalf of" certain foreign powers. Thus, there is not likely to be any violation or abridgment of a constitutional right to speak. See *Johnson v. Eisentrager*, 339 U.S. 763; *Galvan v. Press*, 347 U.S. 522; Schwartz, *The Mail Must Not Go Through—Propaganda and Pornography*, 11 UCLA L. Rev. 805, 842, n. 161 (1964).

In addition, as we show below, even the foreign power is allowed to enjoy the benefits of the subsidy in addressing anyone who desires to receive its message.

Third, the freedom of expression guaranteed by the First Amendment undoubtedly includes opportunities to read and hear as well as to publish and speak,⁵ but the relationship of addressee to the sender of mail is altogether different from that between the publisher or speaker and his audience. Everyman's scrap basket attests the fact that the addressee of mail, if the government makes delivery, receives items that he does not want. The intrusion may seem trivial to some and important to others; but there is an intrusion upon the householder's attention quite unlike the effect of speeches upon a voluntary audience. Congress was aware, when Section 305 was adopted, that many recipients of the Communist propaganda from foreign powers at public expense were not only unwilling addressees but were sufficiently offended to complain to their representatives. See pp. 16-17, *infra*.

The amendment is addressed to these peculiarities of foreign mail. It deals with them in a manner which has minimal consequences for freedom of communication. The Post Office continues to carry the propaganda regardless of its source or content. It continues to make automatic delivery to anyone who, it has reason to believe, wishes to receive the propaganda. That is the case with respect to matter addressed to any government agency or public library

⁵ *Martin v. Struthers*, 319 U.S. 141, 143; cf. *Marsh v. Alabama*, 326 U.S. 501.

or "any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof" (Section 305(c)(1)). It is a fair inference, although not inescapable, that such institutions and individuals may be interested in gathering a wide variety of published matter for their own use or that of others interested in reading it. Similarly, although there have been some difficulties in administration, the statute specifically excepts "any matter which is furnished pursuant to subscription";* for in such cases also the Post Office may fairly infer that the addressee desires the publication. Section 305 also excepts any other matter "ascertained by the Postmaster General to be desired by the addressee."

The sole consequence, therefore, is to suspend delivery at public expense of Communist propaganda from foreign powers or their agents for so long as there is no reason to suppose that the addressee desires to receive it. In such cases the Post Office inquires whether the addressee wishes the mail; if he says that he does, it immediately makes delivery. The practice is to ask the addressee to indicate his wish upon a pre-addressed post card. At one time files

* In the case of newspapers and other well-known periodicals the Post Office may fairly infer that regular copies are sent pursuant to subscription. Moreover, so long as one request for delivery of the mail was treated as notice of a continuing desire to receive it, the subscriber obtained the Communist propaganda without further action. The abandonment of all lists and card files has posed a problem in determining what material is furnished pursuant to subscription where the publication is not readily identifiable. It is impossible to state at this time how the Post Office will hereafter handle this aspect of the administration of Section 305.

of post cards were maintained so that the Post Office might continue to deliver such mail without further indication of the addressee's wishes, but because of criticism that such "lists" could be used by government agencies to scrutinize individuals' interests or beliefs, the files were destroyed, and a new card must be marked in each instance, which is then destroyed after it has served its purpose. However, the statute seems to make it plain that any individual who wishes to have the propaganda delivered without further inquiry may put the Postmaster General upon notice simply by a continuing request in a letter.

The net effect is small indeed. No one who wishes to receive any material is denied it. Such persons are put to the trifling nuisance of marking a post card addressed to the Post Office. There is a short delay in delivery, but it seems inconsequential when one recalls that the matter involved is foreign mail that has already traveled great distances by the slower forms of transportation.

It is true that there are probably some persons who because of inertia or carelessness fail to mark the post card requesting delivery and thus do not see materials which they would receive and might read if all the propaganda were automatically delivered. But the only senders denied this opportunity to intrude themselves upon that group of addresses are foreign powers and those acting on their behalf, and they are denied only the opportunity to have the United States subsidize the intrusion.

The question presented in the present case, therefore, comes down to whether so trivial and temporary an interference with the opportunity of persons in the United States to read the unsolicited propaganda of foreign powers at public expense is unconstitutional even though enacted by Congress to accomplish two legitimate objectives.

One purpose was to protect the sensibilities of the addressees of Communist propaganda who were affronted and often harassed by such mail, especially United States citizens of recent foreign origin. An investigation of the distribution of Communist propaganda through the mails was conducted by the House Un-American Activities Committee in 1956 and 1957. The committee was told early in its investigation that sometime during 1955 those in charge of a screening program which survived from World War II had learned that much of the unsolicited Communist propaganda being sent into the United States through the mails was directed to American citizens whose origins were in Soviet bloc countries. *Investigation of Communist Propaganda in the United States*, Hearing before the House Committee on Un-American Activities, 84th Cong., 2d Sess. (1956) (hereinafter *1956 House Hearings*), p. 4695. This sort of propaganda took the form of an appeal to these addressees to return to their homeland. See exhibits at *1956 House Hearings* 4707-4714. The Deputy Collector of Customs in charge of the program advised the committee that he had received many complaints from persons to whom this material had been addressed (*1956 House Hearings* 4696; see also *id.* at 5427):

Many such complaints have been sent to Members of the House and Senate. The tenor of these complaints are that the recipients do not wish to have this material and in some cases the addressees are frankly scared since their whereabouts in this country have become known. These people unfortunately do not know that this is part of a general program and that thousands of similar letters have been sent, the names often obtained from telephone directories and fraternal organization listings.

An illustrative letter sent by a group of five or six recipients of such mail was read to the committee. *1956 House Hearings 4717.*

To prevent unwanted mail from being inflicted upon unwilling addressees is not to censor their reading but to protect their privacy. The sponsor of the amendment made it plain that he had no reluctance to allow the widest circulation of Communist propaganda (*1962 Senate Hearings 930*):

Certainly we have little or nothing to fear from their propaganda; Americans are accustomed to learning all sides of all issues through our free press. But there is no reason why the American taxpayer should pay for the free or subsidized delivery of Communist propaganda by the Post Office.

In *Breard v. City of Alexandria*, 341 U.S. 622, this Court sustained a local regulation which struck in favor of privacy the balance "between some householders' desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results" (341

U.S. at 644). Intrusion into a mailbox is effective entry into the home, and there can be hardly any doubt that there is a legitimate governmental interest in protecting persons against such unwanted invasions. Indeed, the district court in No. 848 recognized as much, although it mistakenly supposed that this interest could be satisfied by use of the postal regulation which entitles any person to authorize the postmaster to withhold delivery of particular classes of mail. 39 C.F.R. 44.1(a) (F.R. 222). In many cases the addressee will have no reason to suppose that such propaganda will be addressed to him. He is, of course, put on notice by the receipt of propaganda, but the burden of stopping further distribution is no less than the burden upon the willing addressee to arrange it.

In relying upon *Breard v. City of Alexandria* we do not forget that house-to-house canvassing is a familiar—perhaps indispensable—method of seeking converts to new causes. *Martin v. City of Struthers*, 319 U.S. 141. Whatever the extent of the right to knock on doors to summon householders and request their attention, it is irrelevant here for *Breard* and *Struthers* involve the right of the canvassers, whereas here the senders of the mail are foreign powers entitled to no such constitutional protection. The same circumstance, we submit, answers any suggestion that Section 305 discriminates against the dissemination of particular ideas and thus constitutes a form of censorship. Section 305 applies only to propaganda

⁷ This is the short answer to the argument that the statute is broader than necessary. See Brief for Appellant in No. 491, pp. 27-29.

transmitted by or on behalf of certain foreign governments which are refusing to open their mails to the free dissemination of publications from the United States. Since they are all Communist governments, it is safe to assume that they are not engaged in distributing other forms of political propaganda.

The second objective of the sponsors of Section 305 was to deny foreign powers which refused a reciprocal exchange the benefit of having the United States subsidize the delivery of their propaganda to persons who either (a) did not want it or (b) did not subscribe and had too little interest to mark a postcard indicating their desire for delivery. Representative Cunningham, the sponsor of Section 305, testified at the Senate hearings that his amendment was based upon a desire to make Communist political propaganda "pay its own way." *1962 Senate Hearings* 914. This was justified, he said, because Communist countries did not reciprocally permit American publications free access to their citizens (*1962 Senate Hearings* 919):

* * * The point is that they do not deliver our printed matter so it is truly and accurately a free delivery of mail by our Post Office Department because there is no reciprocity by the Communists.

We are spending our money to deliver their printed matter, but they are not spending their money to deliver ours.

In answer to a question from a member of the committee, the Congressman explained that Communist propaganda might be considered as "pay[ing] its way" if unrestricted distribution of it in the United States

would result in similar distribution of this country's literature in Communist countries (1962 *Senate Hearings* 927-928):

* * * The only way it can pay its way is if we get the same reciprocity from the Communist bloc nation. We can afford to spend a little of our money delivering their stuff if they will deliver ours, but they are not delivering ours. Therefore, we are not getting any benefit from delivering this stuff free.

His prepared statement made this point even more explicitly (1962 *Senate Hearings* 930):

In simple language, what the House of Representatives has said to the Communist-bloc nations is this:

"We demand a free exchange of ideas and information between our countries. You are not allowing our ideas and information to be circulated among your people; you are therefore violating the reciprocal terms of the Universal Postal Union. As a result we take this action and will stick to it until you permit the free exchange of information between our countries, including the right of inspection to see that all parties are living up to the agreement."

The subsidy was not trifling. In 1960 the number of pieces of Communist printed matter turned over to the Customs Bureau by the Post Office, excluding first class mail, was 21 million, 607 thousand pieces.

It is argued that the failure to make delivery unless requested interferes with the free receipt of knowledge because the necessity of making a request opens the doors to identification, publicity and reprisals. The interest in anonymity asserted here is

very different from the rights of an association to refuse to disclose its membership list for fear of reprisal which was recognized in such cases as *NAACP v. Alabama*, 357 U.S. 449, and *Bates v. Little Rock*, 361 U.S. 516.⁸ Even if the abstract principle be the same, it has no practical application to the present case. There is not the slightest reason to anticipate governmental reprisal. The present procedure is calculated to reduce, if not eliminate, even the hypothetical possibility that to request delivery of Communist propaganda may lead to investigation. Although a card file was formerly maintained, Post Office procedure has been changed so that no list or file is maintained by that Department (pp. 39-41, *infra*). The addressee is informed that his returned postcard will be destroyed, so that he is disclosing his wish to read Communist political propaganda only momentarily to the postal official who receives and processes the returned notice. What small danger there is that he will become known in the community as a reader of Communist propaganda would seem less significant than the similar risk that might be inflicted, in the absence of Section 305, upon addressees to whom delivery was made even though they were in fact unwilling. Snooping and overzealous neighbors who are concerned about such mail are not likely to inquire how or why the foreign propaganda came to be delivered. We think—and sincerely hope—that both dangers are chimerical. One can hardly be greater than the other, however, and, if a choice must

⁸ See also *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539.

be made, surely the one to bear the risk is the willing, not the unwilling, recipient.

The claim that there is a constitutional right to receive all mail without delay deserves only brief mention. Whatever right exists to uninterrupted delivery of the mails is certainly subject to reasonable regulation by the Post Office. Certain classes of mail, for example, travel more slowly than others. Mail which cannot fit into a box or which is registered and for which a recipient must sign may not be delivered unless the addressee comes to the Post Office to call for it. The delay in delivery in each of these instances is justified by administrative necessity. In the present case, as well, if an inquiry is first to be made of an addressee to determine whether he comes within the class of those which the statute was intended to protect, there will necessarily be some delay in delivery.

There is no indication whatever in this record that the materials detained by the Post Office were of a kind as to which timely delivery is essential. They came from overseas by relatively slow methods of transportation. It is quite clear, moreover, that delay is not the gravamen of the plaintiffs' complaint. If, for example, the statute reversed the presumption and authorized the Post Office to send a notice informing an addressee that Communist political propaganda being detained at the Post Office would be delivered to him in five days unless he returned the card indicating that he did not want it, the delay would be the same.

There is not the faintest resemblance between Section 305 and the licensing laws invalidated in the cases cited by appellant in No. 491 (Brief, pp. 17-19). *E.g.*, *Lovell v. Griffin*, 303 U.S. 444; *Schneider v. State*, 308 U.S. 147; *Thomas v. Collins*, 323 U.S. 516; *Niemotko v. Maryland*, 340 U.S. 268. The present statute does not empower government agents to decide what forms of expression will reach the public. The purpose of the pre-delivery examination in this case is not to decide, as a licensor or censor, whether its contents are fit for distribution. The sole function is to ascertain whether the government is being asked to subsidize the propaganda of a foreign power and a kind of material which the addressee may well be reluctant to receive. If the addressee wishes, the government affords the subsidy and makes prompt delivery. His right to know is unimpaired.

We do not suggest that any such large and important public interests are involved as would support a true invasion of freedom to speak or publication, or of freedom to hear, read and learn. No such interests are implicated on either side. In the final analysis the attack upon Section 305 necessarily asserts that the government owes the plaintiffs a constitutional duty to subsidize the indiscriminate receipt of propaganda from foreign powers (which refuse to disseminate American publications), even though the plaintiffs have too little interest in the propaganda to request its delivery and even though delivery to them would require affronting the sensibilities of other addressees unwilling to receive such distribution. Whatever the wisdom of the legislation or its political symbolism—

and important as they may be in other forums—the mere statement of the legal proposition is enough to reveal that the federal government has no such constitutional duty to subsidize such indiscriminate delivery of the mailings of foreign powers.

II

THE STATUTE DOES NOT VIOLATE THE FIFTH AMENDMENT

A. ALLEGED VAGUENESS IN THE DEFINITION OF "COMMUNIST POLITICAL PROPAGANDA" DOES NOT INVALIDATE THE STATUTE

In defining "Communist political propaganda" the statute incorporates the definition given to the word "political propaganda" in Section 1(j) of the Foreign Agents Registration Act of 1938, 22 U.S.C. 611(j), and adds to it the requirement that such propaganda be "issued by or on behalf of" certain defined countries which are generally those in the Communist bloc. Relying on decisions of this Court which have invalidated criminal statutes whose provisions were vague⁹ or loyalty-oath requirements which were phrased in broad terms,¹⁰ appellant in No. 491 contends that this statute violates the Fifth Amendment because it is vaguely phrased. But unlike the criminal cases, this statute does not require a person "at peril of life, liberty or property to speculate" as to its meaning. *Lanzetta v. New Jersey*, 306 U.S. 451, 453. Nor, unlike the loyalty-oath cases, is any person required to perform any affirmative act (with possible

⁹ *Connally v. General Construction Co.*, 269 U.S. 385; *Lanzetta v. New Jersey*, 306 U.S. 451; *United States v. Cardiff*, 344 U.S. 174, 176.

¹⁰ *Cramp v. Board of Public Instruction*, 368 U.S. 278; *Baggett v. Bullitt*, 377 U.S. 360.

criminal perjury consequences) in reliance on his interpretation of the statute's meaning. Section 305 is merely a guide to Post Office officials in exercising the administrative judgment whether to deliver the mail directly or first ascertain whether delivery is desired. In *Lichter v. United States*, 334 U.S. 742, 786; this Court enumerated a whole series of general statutory phrases which it had sustained in earlier cases as permissible delegations of administrative authority:

“Just and reasonable” rates for sales of natural gas, *Federal Power Comm’n v. Hope Gas Co.*, 320 U.S. 591, 600–601; “public interest, convenience, or necessity” in establishing rules and regulations under the Federal Communications Act, *National Broadcasting Co. v. United States*, 319 U.S. 190, 225–226; prices yielding a “fair return” or the “fair value” of property, *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 397–398; “unfair methods of competition” distinct from offenses defined under the common law, *Federal Trade Comm’n v. Keppel & Bro.*, 291 U.S. 304, 311–312, 314; “just and reasonable” rates for the services of commission men, *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 431; and “fair and reasonable” rent for premises, with final determination in the courts, *Levy Leasing Co. v. Siegel*, 258 U.S. 242, 243, 248–250.

Even under the standards of the cases on which appellant relies, the definition is not unconstitutionally vague. The Foreign Agents Registration Act's definition of “political propaganda” has stood for more than 25 years without challenge. While it may,

as appellant argues, apply by its terms to marginal cases which were not within the legislative intention, that is not the test by which its constitutionality should be measured. *United States v. National Dairy Corp.*, 372 U.S. 29, 32. The words "political propaganda" are themselves readily comprehensible to persons of ordinary intelligence, and the added requirement that it be issued by or on behalf of certain Communist countries prevents wholesale application of the statute to publications beyond its intended scope.

B. THE FAILURE TO AFFORD AN ADMINISTRATIVE HEARING DOES NOT INVALIDATE THE STATUTE

Another Fifth Amendment challenge is based on the fact that the government officials in charge of administering Section 305 do not provide a full hearing before determining whether any particular piece of mail is Communist political propaganda (Brief, No. 491, pp. 34-36). To the extent that this claim is based on the existence of a Post Office "list" of willing addressees of Communist propaganda and this Court's decision in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, it is enough to say that the practice of keeping lists has now been abolished by the Postmaster General (pp. 39-41, *infra*).

As for the mail matter itself, no suggestion is made by plaintiffs as to why a hearing should be required. This is not a case, as were *A Quantity of Books v. Kansas*, 378 U.S. 205, and *Marcus v. Search Warrant*, 367 U.S. 717, in which publications are seized or suppressed. The only determination made by the Customs Bureau agents is whether the material should

be delivered directly or be held for the request of the addressee. The addressee would seem to be the person entitled to notice of any hearing. Once he was given notice there would be nothing to hear; he may have the mail for the asking. The entire notion of an adversary hearing is meaningless in this context.

C. THE CLASS OF EXEMPT RECIPIENTS IS NOT ARBITRARILY SELECTED

The final Fifth Amendment challenge is that the exemptions provided in subsection (c)(1) are arbitrary and that the entire statute must, consequently, fall. The argument proceeds, however, on a basic misapprehension as to the purpose of the exemption. Appellant in No. 491 assumes that the exemption for government agencies, public libraries, or educational institutions is based on the premise that the material covered by the statute "is too hot for the average American to handle" (Br., p. 38).

In fact, however, as the plain meaning of the statute and its legislative history establish, it is intended to reach "Communist political propaganda" addressed to persons whose wishes regarding receipt of such material is unknown. The statute expressly provides for delivery of such mail to the addressee on his request or if his desire to receive it "is otherwise ascertained by the Postmaster General." In other words, Congress was as anxious to deliver such mail to those who wanted it as it was to spare those who did not.

During the hearings on the legislation, representatives of educational institutions, libraries, and scientific organizations testified in opposition to the Cun-

ningham amendment."¹¹ Their position was based largely on their own need to obtain the sort of information which would be contained in the publications to which the statute would apply. After this testimony, Representative Cunningham agreed to add the following provision to his bill (1962 *Senate Hearings* 923):

Provided, however, that any mail matter addressed to any United States Government agency, any college or university, or any public library shall be excluded from the provisions of this section.

This was obviously a recognition of the fact that this group of recipients would overwhelmingly want to receive such mail, and it would be a needless administrative burden to require notices to be sent to them. Congressman Udall subsequently summarized this thinking as follows:¹²

* * * I would think it is a rational assumption to make that the material is wanted if it is addressed to Hubert Jones, professor of Russian

¹¹ 1962 *Senate Hearings* 858-859, Letter and resolution from the American Association of University Professors; *id.* at 863-867, Testimony, an official of the National Science Foundation; *id.* at 870-873, Testimony, L. Quincy Mumford, Librarian of Congress; *id.* at 875-880, Statement, the American Council on Education; *id.* at 887-889, Statement, American Association of University Women; *id.* at 895-897, Statement, Association of Research Libraries; *id.* at 897-899, Statement, American Library Association; *id.* at 906-911, Statements and letters from other educational institutions.

¹² *Exclusion of Communist Political Propaganda from the U.S. Mails*, Hearings before the Subcommittee on Postal Operations of the House Committee on Post Office and Civil Service, 88th Cong., 1st Sess. (1963), p. 64.

Studies, American University or to the Russian editor or the foreign editor of the New York Times.

III

THE STATUTE DOES NOT VIOLATE THE FOURTH AMENDMENT

A final challenge to 39 U.S.C. 4008 is based on the Fourth Amendment, presumably on the ground that the inspection of the mail matter received by any particular addressee constitutes an unreasonable search or seizure (Brief, No. 491, pp. 39-41). Plaintiffs do not explain, however, how the Post Office's examination of unsealed mail matter—which is expressly left unsealed for purposes of postal inspection (39 U.S.C. 251)—constitutes a search or seizure. Nothing at all is confiscated, and the only invasion of privacy is precisely that which the sender contemplated when he sent his mail unsealed rather than by first-class postage. See *Ex parte Jackson*, 96 U.S. 727.

Appellant in No. 491 agrees that third-class mail may be searched to find evidence, but apparently contends that it may not be read in order to determine its contents. But such mail must remain unsealed precisely for the purpose of permitting postal officials to inspect it and determine whether it qualifies as third-class mail. 39 U.S.C. 251, 235. The sort of examination involved in determining whether the mail is covered by 39 U.S.C. 4008 is no different from the inspection provided under 39 U.S.C. 251. In each instance the mail is not being read in order to decide whether it should be suppressed or in order to invade the addressee's privacy. The only purpose of both

inspections is to determine how the mail should be carried and delivered while in the custody of the Post Office.

The contention that an addressee is put to the choice of surrendering his mail or incriminating himself by coming forward to claim it (Brief, No. 491, pp. 40-41) is untenable. Evidence that an addressee of third-class mail expressed a desire to receive unsealed and unsolicited Communist political propaganda can, by no stretch of the imagination, be incriminatory because it has no conceivable probative value in a criminal prosecution. Even in a prosecution under the Smith Act such evidence would be inadmissible because the prejudice to defendant and deterrence to legitimate inquiries would outweigh any slight probative value it might have.

CONCLUSION

For the foregoing reasons, the judgment in No. 491 should be affirmed and the judgment in No. 848 should be reversed.

Respectfully submitted.

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MARCH 1965.

APPENDIX

Section 305 of the Postal Service and Public Employees Salary Act of 1962, Public Law 87-793, October 11, 1962, 76 Stat. 840, 39 U.S.C. Section 4008:

(a) Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be "communist political propaganda", shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

(b) For the purposes of this section, the term "communist political propaganda" means political propaganda, as defined in section 1(j) of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611(j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951

or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended.

(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material whether or not "communist political propaganda" addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government mails an equal amount of material for delivery in any country described in subsection (b).

Section 1(j) of the Foreign Agents Registration Act of 1938, 52 Stat. 631 (22 U.S.C. 611(j)), reads:

(j) The term "political propaganda" includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political sub-

division of any other American republic by any means involving the use of force or violence. As used in this subsection the term "disseminating" includes transmitting or causing to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce or offering or causing to be offered in the United States mails;

TREASURY DEPARTMENT,
BUREAU OF CUSTOMS,
Washington, January 4, 1963.

To: Collectors of customs, appraisers of merchandise (Mail Division).

Subject: Restrictions and prohibitions: Importation of political propaganda in the mails.

Reference: Section 9.13, Customs Regulations, as added by Treasury Decision 55797, approved December 27, 1962.

1. PURPOSE

This circular is to call attention to Treasury Decision 55797, copy attached, promulgating regulations under Section 305, title III of the Postal Service and Federal Employees Salary Act of 1962, Public Law 87-793, approved October 11, 1962 (39 U.S.C. 4008), relating to Communist political propaganda arriving in the mails from abroad.

2. ACTION

The special customs units which will administer the law and regulations in question have been established at the ports of Chicago, Ill., El Paso, Tex., Los Angeles, Calif., Miami, Fla., New Orleans, La., New York, N.Y., San Francisco, Calif., Seattle, Wash., and Honolulu, Hawaii. All mail subject to examina-

tion under this law will be submitted to the special customs units by the Post Office Department.

3. EFFECTIVE DATE

The above-mentioned law and regulations are effective on January 7, 1963.

4. SUPERSEDED MATERIAL

Circular RES-15-PEN, dated April 7, 1961, is hereby superseded.

File: PEN 633.3 K.

PHILIP NICHOLS, Jr.
Commissioner of Customs.

(T.D. 55797)

MAIL MATTER, COMMUNIST POLITICAL PROPAGANDA— CUSTOMS REGULATIONS AMENDED

Section 9.13, Customs Regulations, relating to mail matter determined to be Communist political propaganda, added

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C.

To Collectors of Customs and Others Concerned:

TITLE 19—CUSTOMS DUTIES

CHAPTER I—BUREAU OF CUSTOMS

PART 9—IMPORTATIONS BY MAIL

Section 305, title III of the "Postal Service and Federal Employees Salary Act of 1962," Public Law 87-793, approved October 11, 1962, added a new section 4008 to title 39 (The Postal Service), United States Code, entitled "Communist political propaganda." The section becomes effective on January 7, 1963.

Subsection (a) of section 4008 requires determinations to be made as to whether certain mail matter is "Communist political propaganda" in accordance with the definition prescribed by subsection (b) of section 4008.

Part 9 of the Customs Regulations is hereby amended, as set forth below, to add a new section 9.13 to place in collectors of customs the authority to make the foregoing determinations. The new section also provides, among other things, that such determinations shall be communicated forthwith to the appropriate postmaster.

New section 9.13 shall become effective on January 7, 1963, and reads as follows:

9.13 Communist political propaganda

(a) Collectors of customs shall make determinations required by subsection (a) of 39 U.S.C. 4008* as to whether mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country is "Communist political propaganda" within the meaning of subsection (b) of 39 U.S.C. 4008.* Such determinations shall be communicated forthwith to the appropriate postmaster.

*(a) Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be "communist political propaganda", shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable

(b) A collector of customs is authorized to make the foregoing determinations with respect to all mail matter whether it arrives in the customs collection district under his jurisdiction or in a customs collection district under the jurisdiction of any other collector of customs.

(c) Subsection (c) of 39 U.S.C. 4008* provides for the delivery of certain mail matter to specified classes of addresses without reference to whether such mail matter is "Communist political propaganda." The Post Office Department will determine which mail is in these categories (sec. 305, 74 Stat. 654; 39 U.S.C. 4008).

Part 9 is amended to add a footnote designated "9" reading as follows:

time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

(b) For the purposes of this section, the term "communist political propaganda" means political propaganda, as defined in section 1(j) of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611(j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951 or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended.

(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material whether or not "communist political propaganda" addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government mails an equal amount of material for delivery in any country described in subsection (b) (39 U.S.C. 4008).

(R.S. 161, as amended, sec. 624, 46 Stat. 759; 5 U.S.C. 22, 19 U.S.C. 1624.)

PHILIP NICHOLS, Jr.,
Commissioner of Customs.

Approved: December 27, 1962.

JAMES P. HENDRICK,
Acting Assistant Secretary of the Treasury.

Mr. DULSKI. The committee will stand adjourned until tomorrow at 10 o'clock.

(Whereupon, at 11:53 a.m., the subcommittee adjourned, to reconvene at 10 a.m., Thursday, June 20, 1963.)

RL No. 65-38

POST OFFICE DEPARTMENT

DEPUTY POSTMASTER GENERAL

[Regional Letter]

Date: 3/1/65

Subject: Destruction of Records Relating to Delivery of Mail Containing Communist Political Propaganda.

I. PURPOSE

To provide for the immediate destruction of POD Forms 2153-X upon which addressees have indicated their desire to receive communist political propaganda.

II. ACTION OFFICES

Chief Postal Inspector.

Regional Directors at New York, New York; Atlanta, Georgia; Chicago, Illinois; Dallas, Texas; Seattle, Washington; San Francisco, California.

Postmasters at New York, New York; Miami, Florida; San Juan, Puerto Rico; Chicago, Illinois; New Orleans, Louisiana; Seattle, Washington; San

Francisco, California; Los Angeles, California; Laredo, Texas; El Paso, Texas; Honolulu, Hawaii.

III. BACKGROUND

Since January 7, 1963, the postmasters at the eleven offices mentioned in paragraph II have been sending to addressees of mail matter considered by Bureau of Customs to be communist political propaganda, POD Form 2153-X. On this form addressees are requested to indicate whether they desire to receive the mail matter mentioned. Upon receipt of this card by the postmaster it is appropriately filed for future reference solely for the purpose of eliminating the necessity of making subsequent contacts with the same addressee as additional mail matter arrives. Many addressees have objected to the maintenance of any such record.

IV. STATEMENT OF POLICY

It has been decided that the Forms 2153-X returned to the eleven postmasters mentioned above will not in the future be retained in the files of the Department, except in those cases where the addressee indicates on the form that he does not desire to receive the specific items of mail mentioned or any other similar communist political propaganda. The Department will not, in the future, maintain any record of the wishes of those addressees who desire to receive communist political propaganda. This will require the eleven above mentioned postmasters to send inquiry cards to all addressees each time mail matter is received unless Form 2153-X is on file showing the addressee does *not* desire the specific item. Upon the return of the cards indicating that the addressee does desire to receive the mail matter mentioned, the mail matter will be delivered and the card promptly destroyed without record being made of its receipt.

V. IMPLEMENTATION OF NEW POLICY

Under the direct supervision of the Chief Postal Inspector, or his designee, the eleven postmasters in the offices mentioned in paragraph II will destroy all POD Forms 2153-X now maintained in their files and upon which the addressees have indicated that they desire to receive specified items of communist political propaganda.

The Chief Postal Inspector, or his designee, will report to the Postmaster General that he personally witnessed the destruction of all such cards and the number thereof destroyed.

Destruction of POD Forms 2153-X pursuant to this instruction will be accomplished no later than March 15, 1965.

JOHN A. GRONOUSKI,
Postmaster General.

FILE COPY

Office-Supreme Court, U.S.

FILED

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JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1964

No. 848

JOHN F. FIXA, Individually and as Postmaster, San Francisco, California; JOHN A. GRONOUSKI, Individually and as Postmaster General of the United States; GEORGE BROKAW, Individually and as Collector of Customs, San Francisco, California; DOUGLAS DILLON, Individually and as Secretary of the Treasury of the United States,

Appellants,

vs.

LEIF HEILBERG,

Appellee.

APPELLEE'S BRIEF

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1964

No. 848

JOHN F. FIXA, Individually and as Postmaster, San Francisco, California; JOHN A. GRONOUSKI, Individually and as Postmaster General of the United States; GEORGE BROKAW, Individually and as Collector of Customs, San Francisco, California; DOUGLAS DILLON, Individually and as Secretary of the Treasury of the United States,

Appellants,

vs.

LEIF HEILBERG,

Appellee.

APPELLEE'S BRIEF

I.

STATEMENT OF THE CASE

A. How the Section 4008 Program Works

The constitutional infirmities of the mail screening program authorized by 39 U.S.C. § 4008 are best dis-

closed by an understanding of its operation. This understanding will disclose that the statute not only has unconstitutional applications as to "communist" printed matter from abroad, but also as to domestic mail and as to *all* mail from at least 28 countries (listed at R. 163-164) including countries normally thought of as non-communist or anti-communist.

The operation of the screening program was described in detail by Post Office and Customs spokesmen before the Subcommittee on Postal Operations of the Committee On Post Office and Civil Service of the House of Representatives on June 19 and 20, 1963. These hearings are printed under the title *Exclusion of Communist Political Propaganda From the U. S. Mails*, 88th Cong., 1st Sess. (1963) and are hereafter referred to as "Hearings on Propaganda."

(1) The Bureau of Customs decides what countries' mail shall be screened for "communist political propaganda." (Hearings on Propaganda, p. 28). This decision is made, according to Customs spokesman, Mr. Irving Fishman, on the basis of the statutory language "issued by or on behalf of any country" [39 U.S.C. § 4008(b)] and thus many non-communist countries, such as England, Canada, Japan, Mexico, Philippines, Taiwan and Hong Kong, are included because "communist" material is "printed or otherwise prepared" there.¹

¹This exchange at p. 9 of the Hearings on Propaganda is descriptive of the method by which Customs makes a determination:

"Mr. Cunningham. Let us take England, for example. A

(2) All mail from the designated countries is routed to one of ten screening points known as "foreign propaganda units" or "propaganda screening units." (Hearings on Propaganda, pp. 7, 32; R. 41). These units have been specially created to operate the § 4008 program and are "jointly" operated by post office and customs personnel (R. 112; Hearings on Propaganda, p. 2). In most instances sealed letters, even though exempt by law, are routed to the propaganda screening unit because they come from abroad in bags containing a mixture of all kinds of foreign mail (Hearings on Propaganda, pp. 7, 39).²

(3) At the propaganda screening unit the mail is sorted and sealed letters not subject to the terms of the statute and "exempt"³ mail is returned to the

great deal of this comes from England, and it is published by Communist or Communist front groups.

Mr. Fishman. Yes.

Mr. Cunningham. That would be on behalf of, we will say, some Communist bloc nation.

Mr. Fishman. We have a little bit of a problem there, which I would like to explain briefly. The phrase 'issued by or on behalf of' invites a determination that the material is issued on behalf of. Short of making an investigation to determine whether the material was actually issued by or with funds from a Soviet bloc country, it is not a simple task to determine this. We have examined a great deal of material which comes from England, some of it published by known Communist front organizations or representatives thereof, and we have held some of this material, but I just wanted to explain the additional problem created by the search for material 'issued by or on behalf of.'

²Post Office spokesman, Mr. Tyler Abell, testified: "Technically you are supposed to get sealed mail in one bag, AO mail in another bag, and parcel post in another bag. When you shake it out, this just doesn't jibe with the facts." Hearings on Propaganda, p. 39.

³"Exempt" means mail addressed to Federal government agencies, public libraries, scientific or professional institutes, or an official thereof, and material forwarded pursuant to a reciprocal cultural international agreement. 39 U.S.C. § 4008(c).

post office for delivery (Hearings on Propaganda, pp. 40, 42). The delay as to these classes of mail may be not more than a day or two.

(4) The remaining mail from the designated countries is then given to Bureau of Customs examiners (Hearings on Propaganda, p. 3) who then [quoting the answer to interrogatory No. 9 to defendant George K. Brokaw, Collector of Customs in San Francisco (R. 176)] operate as follows: "If from the addressee and the addressor, the nature of the contents is already known, it is not opened and read. If the material is suspected, it is opened and read. The determination of whether or not it is propaganda material is made by the Assistant Deputy Commissioner [Mr. Fishman] in New York." (Emphasis supplied.)⁴ Occasionally, because of translation or other problems, mail will have to be sent from one screening unit to another for its preliminary reading. (Hearings on Propaganda, p. 31, note 2; the answer

⁴A more detailed explanation of the transmission of all new material to New York was given by Mr. Fishman (Hearings on Propaganda, pp. 9-10) as follows:

"Mr. Fishman. The procedure we follow is approximately as follows: We have, of course, made available to our people a copy of the definition of political propaganda contained in the Foreign Agents Registration Act. As we see it, Communist political propaganda is political propaganda issued in these various countries or on behalf of such various countries. Each translator or analyst is required not only to reach a finding that a publication contains political propaganda, but justify it then by excerpts from the publication, from the newspaper or magazine, which bear out his finding. We have here for the committee some such excerpts from various newspapers, magazines, and so on, selected from the groups that we have held out. His finding is then reviewed not only by his immediate superior but also in our office in New York."

to Brokaw Interrogatory No. 8 [R. 176] indicates only Chinese, Japanese and Korean translators are available in San Francisco.)

(5) Non-propaganda is then returned to the post office for delivery. As to propaganda, § 4008(a) provides that it "will be delivered only upon the addressee's request, except . . . in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee." Under the Postmaster General's Regional Letter of March 1, 1965 (Government Brief, pp. 37-39), the Postmaster will not maintain "any record of those addresses who desire to receive communist political propaganda." Instead, as to each piece of mail or group of pieces of mail, the addressee will receive a notice on Form 2153-X.⁵ This means that even after it has been classified as communist political propaganda, the mail will not be sent to the post office for delivery until a Form 2153-X is prepared, mailed, delivered to the addressee and returned by him. The notice indicates only the title of the publication and does not give the country of origin or preparation nor does it give the language of the publication (R. 10). The Postmaster General exercises some power to "otherwise ascertain" that the mail is desired, and in the case of radio and television stations, newspapers and magazines that

⁵This form is reproduced at R. 10. Information counsel has received indicates that Form 2153-X continues to be used in the screening program, but, to conform to the Postmaster General's Regional Letter of March 1, 1965, the bottom lefthand space for "similar publication" is blocked out.

desire is evidently presumed (Hearings on Propaganda, pp. 44, 46). However, matter which is "furnished pursuant to subscription" does not escape the delay of the Form 2153-X process because the propaganda unit can not maintain a record of the subscription, and the General Counsel of the Post Office Department has determined (see the letter of the General Counsel reproduced as Appendix I to this brief) that the law does not allow postal employees to accept the sender's notation that the matter is furnished pursuant to subscription.⁶

(6) The practice is to hold "communist political propaganda" mail 20 days after Form 2153-X is sent (Hearings on Propaganda, p. 29), and, if there is no request for delivery, the mail is destroyed. No provision is made to ascertain whether the notice has been actually received by the addressee so that mis-delivery or vacation schedules may cause mail to be destroyed. Throughout the country, from January of 1963 to July of 1964 out of 35,121 Form 2153-X notices sent, 15,031 were not returned at all; 4,524 were "undeliverable"; 8,947 were returned asking that no such mail be delivered; 6,721 were returned asking that all such mail be delivered; and 3,989 were re-

⁶We have great difficulty in following the statement at p. 15 of the government's brief that "any individual who wishes to have the propaganda delivered without further inquiry may put the Postmaster General on notice simply by a continuing request in a letter." How is this letter to be disseminated to all the screening units? And is not the retention of such a letter a violation of the Regional Letter of March 1 which states: "The Department will not, in the future maintain any record of the wishes of those addressees who desire to receive communist political propaganda?"

turned asking that the particular publication be delivered.⁷

Earlier we said that the screening program has application to domestic mail. There are but two records of this. The first appears in *McReynolds and Pappenheim v. Christenberry*, 233 F. Supp. 143 (Cert. den. Jan. 18, 1965; appeal from denial of three-judge court pending in Second Circuit). There Pappenheim alleged (the district judge wrote "the facts are not in dispute.") he purchased in New York City a number of books published in communist countries (233 F. Supp. at 145). He had the books mailed to his home in Cambridge, Massachusetts, but before they were delivered he received a Form 2153-X naming the books. He did not return the card but wrote letters to the postmaster asking for details and for an extension of time. No replies to his letters were received, but two months after he received the Form 2153-X, he received his books. The district judge wrote that the sending of the notice in this instance may have been "an error" (233 F. Supp. at 148). Nevertheless, the § 4008(a) authorizes detention of mail "upon its subsequent deposit in the United States domestic mails . . ." and it seems to have been the

⁷These statistics were furnished by Mr. Louis Doyle, General Counsel of the Post Office Department, to the Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure and placed in the record of subcommittee hearings on February 24, 1965. That hearing is not as yet printed but counsel has the typewritten transcript and the statistics appear on page 258 et seq. thereof. The printed hearing will shortly be available. Note that the figures reflecting the disposition of the notices add to a larger number than the total notices sent. This is true of all such figures furnished by the Post Office. See R. 42-48.

intent of Congress that qualifying propaganda be detained no matter from what source it enters the U. S. mails.

The second record concerning domestic mail is an anticipation by Mr. Abell of post office action at pp. 49-50 of the Hearings on Propaganda:

Mr. Cunningham. * * * Furthermore, this law is firm enough in that if this comes in by ocean freight for dissemination in our U.S. mails, you are not doing anything about it.

Mr. Abell. Could I comment on that. You have brought that up several times.

Mr. Cunningham. Yes, sir; and I am going to keep bringing it up.

Mr. Abell. Fine. The Customs' testimony yesterday was rather a shock to the Post Office Department because it is our understanding, or has been, and I thought that this had been made clear among ourselves, that when this material comes in by ocean freight, Railway Express or air express, it is subject to customs' examination. It is not mail, it is not handled by us at this point, but it is looked at by customs, just the way they look at your suitcase or mine when we come into the United States from abroad. At that point we thought we had an understanding with Customs that they would notify us of the existence of this material and we could thereafter take steps to keep it out of the domestic mail.

* * *

Mr. Cunningham. * * *. So this matter of ocean freight, this mail coming in by ocean freight and then dumped in the mail system is covered by the act—

Mr. Abell. It is covered.

Mr. Abell's assertion here should make one skeptical concerning what happened to Mr. Pappenheim's books mailed from New York to Massachusetts.

B. History of Section 4008

We have attached to this brief as Appendix III a survey of government intervention against propaganda from abroad, from 1940 through the legislative history of the adoption of 39 U.S.C. § 4008 (sometimes known as the Cunningham Amendment) in late 1962. Much of this material is covered in greater detail in two articles; Schwartz and Paul, *Foreign Communist Propaganda In The Mails: A Report On Some Problems Of Federal Censorship*, 107 U. Pa. L. Rev. 621 (1959) and Schwartz, *The Mail Must Not Go Through—Propaganda and Pornography*, 11 U.C.L.A. L. Rev. 805 (1964).

When the program commenced in 1940 under the authority of an opinion by then-Attorney General Robert Jackson (39 Ops. Att'y Gen. 535) it was conceived as an adjunct to the Foreign Agents Registration Act. Its purpose then was to confiscate material the content of which allegedly violated the Espionage Act of 1917. Under the same auspices, the program was revived in 1951 due to the pressure of the Korean war. But the critical fire of scholars, librarians, civil liberties groups and many individuals, caused the program to be changed from one of confiscation to one utilizing a notice-request procedure. Finally, on March 17, 1961, President Kennedy announced that following consultation with the Secretary of State, the Post-

master General, the Secretary of the Treasury, and the Attorney General, and following the unanimous recommendation of the Planning Board of the National Security Council, the screening program was being discontinued. The President and his advisers found no intelligence value in the program and found that it hindered our relations with communist countries. See the White House announcement reproduced as Appendix II of this brief and *New York Times*, March 18, 1961, page 8.

The present program is a direct copy of the program discontinued by President Kennedy, with the exception that its operation has statutory authority and exemptions are created by law. Though some members of Congress may have accepted the program under the illusion (see *infra*) that it would save the taxpayers money, and others because they believed it necessary to stop harassment of refugees from communist countries, the history of this type of government activity, and the particular legislative history of section 4008, leave no doubt that the purpose (as well as the effect) of the program was to inhibit the circulation of written material because of disagreement with its content. This was the finding of the court below which wrote (R. 221):

A reading of the legislative history [footnote omitted] makes it abundantly clear that the purpose of the new legislation was primarily to control, restrict and prevent the delivery of matter found to be communist propaganda, an infringement upon the dissemination of ideas, and, therefore, a clear and direct invasion of First Amendment territory.

C. Statement of the Facts in the Court Below

The brief of the government eliminates certain essential facts of the case developed in the court below and therefore the case must be restated. On July 12, 1963, appellee received a Form 2153-X as set out at R. 10. The notice stated that a certain piece of mail was communist political propaganda and would be destroyed unless appellee's reply expressing a desire to receive the mail was received by August 2, 1963. On July 30, 1963, this suit was filed. Appellee alleged he desired to receive the mail *without* it being "delayed, labeled, read, screened, passed, detained, destroyed or otherwise processed pursuant to the terms of 39 U.S.C. § 4008." (R. 3). Appellee also alleged the existence of a list kept by defendants of persons desiring to receive "communist political propaganda" and that he did not want his name on the list for fear of adverse consequences.

On August 2, 1963, appellee brought on for hearing before a single district judge a motion for a temporary restraining order (R. 11; incorrectly styled a "preliminary injunction") to prevent the destruction of the mail pending the disposition of his suit. As soon as the case was called, a most unusual incident occurred when the Assistant United States Attorney (appearing to resist the motion on behalf of the defendants) engaged the attention of the appellee and personally handed him a letter (R. 15) which he represented was the subject matter of the motion for a temporary restraining order. Appellee's counsel announced that the purported delivery was not accepted

(R. 17) but the court ruled that the mail was no longer in danger of destruction and denied the temporary restraining order (R. 24-25). The action of the United States Attorney was consistent with the government's policy to attempt to moot other suits raising challenges to the validity of the screening program. See the affidavits at R. 36-40.

The government then moved to dismiss on the basis of mootness (R. 25) and the motion was denied without prejudice by a single judge (R. 34). The motion was renewed before a three-judge court (R. 35) and testimony was presented, since the motion was treated as one for summary judgment under Fed. Rules Civil Proc. 12 (b). Appellee testified that as a representative of the Universal Esperanto Association he receives and expected to continue to receive large quantities of foreign mail, much of it from communist countries (R. 115; see also R. 178-180). Appellee also testified that he is a citizen of Denmark but is considering applying for United States citizenship (R. 121). Appellee testified as to his objection to his mail being labeled (R. 130) and delayed (R. 131), and his fear that the fact that he indicated a desire to receive what the government had labeled "communist political propaganda" might be used against his citizenship application^a (R. 134, 137), and might cause

^aThis was not an idle fear. In 1941 the Supreme Court of California decided *In re Bogunovic*, 18 Cal.2d 160. There the trial court and three judges of the District Court of Appeal (*In re Bogunovic*, 106 P.2d 247) had denied citizenship to the applicant. The Supreme Court reversed stating at 18 Cal.2d 165: "The fact adverse to the positive showing made by the applicant was his two years' subscription to the communist publication [a weekly

him to be called before an investigating committee (R. 139).

During appellee's testimony he identified and there was introduced in evidence (R. 126) Plaintiff's Exhibit No. 2 (R. 150-151) which was a Form 2153-X addressed to the Postmaster in New York City and purporting to be a message from appellee that he wanted "this publication" [the Form listed no publication; cf. the Form at R. 10] and "Similar Publication" delivered to him. The notice was postmarked as mailed in Washington, D.C. In fact appellee did not fill out this notice or instruct that it should be filled out for him (R. 125). It was conceded that the card was filled out by the Post Office Department and misdelivered to the appellee rather than the New York City Postmaster (R. 210). In this way appellee was forced to indicate his "desire" to receive "communist political propaganda" despite his unwillingness to allow his mail to be opened, read and delayed in compliance with the terms of section 4008.

The motion to dismiss was denied, and the case was submitted for decision after a pre-trial conference (R. 181 et seq.) and a brief trial hearing (R. 207 et seq.). The unanimous order enjoining the program is stayed pending this appeal (R. 225).

paper in Yugoslav known as "Rodnik"], which had expired more than five years prior to his application. * * * The only reason apparent from the record for the order of denial was the fact that the applicant had read the communist party organ. . . ."

II.

SUMMARY OF ARGUMENT

At first blush, the propaganda screening program may seem to be only an inconvenience, a minor blemish on the face of freedom. When the pervasive effects of the program are appreciated, the blemish is seen to be a measure of the whole because its operation abridges freedom of speech and press in the most direct way, on the basis of political content. Not all these effects have been suffered directly by appellee, but this court has not hesitated to "take into account possible applications of the statute in other factual contexts besides that at bar" (*NAACP v. Button*, 371 U.S. 415, 432).

The right to receive the communication of intelligence, although affirmed by this court in *Martin v. Struthers*, 319 U.S. 141, 143, has not been a First Amendment battleground, as has the right to publish and distribute written material. However, the concept of *communication* has been the essence of this struggle, as no censor would object to publication and distribution if he could be assured that no passing on of ideas would take place, and no one would publish if he could not communicate.

Section 4008 results in governmental intervention abridging free communication of ideas because it deters the receipt of mail protected by the First Amendment for reasons other than the desire of the recipient not to receive it. Practice in the past shows that when the government has been informed of the receipt of "communist political propaganda," the in-

formation has been used against the recipient. Even under the present administrative practice, there is a sound basis for similar fears of misuse of information because Customs agents, who jointly administer the program, are free to keep lists and to disclose information.

By labeling mail "communist political propaganda" the government has glued on a "poison" label which deters communication in the same manner as did the "informal censorship" outlawed in *Bantam Books v. Sullivan*, 372 U.S. 58. Moreover, the registration requirement for the receipt of "communist" mail does not differ substantially from the registration requirement for delivery of a labor speech outlawed in *Thomas v. Collins*, 323 U.S. 516, despite the fact that there was no showing that a license to give the speech would not have been granted if applied for.

The screening program results in a delay in delivery of almost all mail from at least 28 countries. Whether this is but a day or two in the case of sealed (first class) letters, or a far longer period of time for "communist political propaganda," such detention for the purpose of examining and labeling political content abridges the First Amendment. Sequestration of material protected by the First Amendment, is prohibited under *A Quantity of Books v. Kansas*, 378 U.S. 205, when done for censorship purposes. There has been no showing of a compelling governmental need for these delays; nor is there a lack of alternative means to accomplish the alleged governmental purposes of the program without damaging constitutional freedoms.

Unfortunately, the administrative change to this program adopted while the case was pending in this court only adds to the delay in receipt of mail since an expression of desire must be received for *each* piece of mail found to be "communist political propaganda."

Appellee also argues an independent right of anonymity (*Talley v. California*, 326 U.S. 60) and a First Amendment right to be free of a search of mail for the purpose of suppressing its political content (*Marcus v. Search Warrant*, 367 U.S. 717). Moreover, the government has no power to inspect mail to evaluate it for its political content, as that power is reserved to the people under the Ninth and Tenth Amendments.

Appellee's right to be free of an unreasonable search and seizure is abridged by the screening program since any search made for an unconstitutional purpose is "unreasonable." Lastly, the inherent vagueness and overbroadness of the statutory standards for the operation of the screening program make it so arbitrary and unreasonable as to violate the guarantee of due process of law under the Fifth Amendment.

III.

ARGUMENT

A. SECTION 4008, IN PURPOSE AND EFFECT, IMPOSES A DIRECT RESTRAINT UPON THE CIRCULATION OF POLITICAL OPINION THROUGH THE UNITED STATES MAILS IN VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The First Amendment "was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). It embraces the liberty of circulation through the mails, *Ex parte Jackson*, 96 U.S. 727 (1877), and it protects the right to receive information as well as the right to distribute information. *Martin v. Struthers*, 319 U.S. 141 (1942). Moreover, the "constitutional protection does not turn upon the 'truth, popularity, or social utility' of the ideas and beliefs which are offered." *New York Times v. Sullivan*, 376 U.S. 254, 271. Where the legislative purpose of a congressional enactment is to restrict the free flow of political ideas and that purpose is effective as shown by injuries to the free flow of information, there is the clearest kind of invasion of First Amendment territory. The two main elements of this First Amendment invasion are legislative purpose and judicially cognizable injury.

The principal legislative purpose of section 4008 is the interference with the flow of certain political ideas into the United States (Opinion below at R. 221). The motives behind this purpose are immaterial, but the history described in Appendix III to

this brief and the legislative history of section 4008 make it clear that the First Amendment trespass is not a peripheral result of some legitimate purpose, such as an inspection for dutiable goods; rather the trespass has its basis in the political ideas of the material itself. We proceed to show that this has caused judicially cognizable injuries.

1. Deterrence

The three-judge court below unanimously found section 4008 unconstitutional under the First Amendment because it believed that the Post Office would be required to maintain a list of persons indicating a desire to receive "communist political propaganda," and that, given the past history of such lists,⁹ this fact "cannot help but deter the free expression of ideas" (R. 221). The appellants have now attempted to take the sting out of that holding by adopting, for the time being, an administrative practice whereby post office personnel would administer the statute without the dangerous list (Regional Letter of March 1, 1965, Gov't Brief, pp. 37-39). Appellee is not reassured by this policy and still feels that the statute necessarily threatens to cause him and other persons harm because of their choice of reading materials.

The primary deterrent which was relied on by the court below and which furnishes historical precedent for the misuse of information obtained through past screening programs, is the fact that section 4008 is a

⁹"[R]outinely turned over to the House Committee on Un-American Activities", R. 220. See also Schwartz, *The Mail Must Not Go Through—Propaganda and Pornography*, 11 U.C.L.A. L. Rev. 805, 829-30.

joint operation with both post office and Bureau of Customs personnel manning the propaganda units (R. 112; Hearings on Propaganda, p. 3). Each piece of mail coming to the screening unit must be handled by a Bureau of Customs employee unless it is either a sealed letter or exempt under section 4008(c). The recognition by the Post Office Department that the information obtained by its employees might be misused, and the steps taken to try to prevent that misuse, only highlight the total absence of such efforts by the Bureau of Customs. Customs employees are not preventing from noting the names of recipients of "communist political propaganda" and are not inhibited in the disclosure of this information. Yet it is the Customs officials who have provided the occasion for the fears expressed by addresses of material labeled under section 4008.¹⁰

¹⁰Mr. Irving Fishman, Deputy Collector of Customs for New York, testified as follows before a House Committee concerning the predecessor to the Section 4008 screening program:

"Mr. Arens: You have given the Committee, in private session, lists in great volume of the recipients of this communist propaganda, have you not?"

"Mr. Fishman: That is right."

(Hearings Before the House Committee on Un-American Activities, 85th Cong., 2d Sess. 2794 (1958).)

More recently Mr. Fishman testified: "[W]e have been instrumental in furnishing a great number of the intelligence fraternity with information on what is coming into the country. We have been able to keep for example, the Department of Justice, the Foreign Agents Registration Section, aware of the activity of the foreign agents so that they can compare what we have given them with what the foreign agents report themselves each year, and we have been helpful to a great many other intelligence agencies."

(Hearings Before a Subcommittee of the House Committee on Appropriations, Treasury-Post Office Departments and Executive Office Appropriations for 1964, 88th Cong., 1st Sess. 142 (1963).)

See also R. 120-123, 134, 137, 139; Brief for the Appellant in *Lamont v. Postmaster General*, No. 491, this Term, at p. 21.

That this deterrent effect is not fanciful is shown by appellee's testimony in this case (R. 139) and by his specially sensitive position as a potential applicant for citizenship (R. 134, 137; and see *In re Bogunovic*, 18 Cal. 2d 160, discussed in note 8, *supra*). Many other persons who might like to receive all mail from abroad and make their own decisions as to its character are in positions of even greater sensitiveness. The man whose ability to earn a livelihood is dependent upon holding a security clearance, or the school teacher whose contract is renewable only at will, could not, in many cases, invite disaster by reading what the government has warned them contains seeds of treason. The starkest proof that this is the case is contained in the statistics furnished by the Post Office Department showing that the most numerous classification for disposition of Form 2153-X notices is for those who fail to even return the notices (R. 42; see also text of this brief at page 6, *supra*).

That the Constitution provides protection against such inhibitions to the exercise of constitutional rights is made clear by *Shelton v. Tucker*, 364 U.S. 479, 485-487; *Gibson v. Florida*, 372 U.S. 539; *Talley v. California*, 362 U.S. 60; see also *United States v. Rumely*, 345 U.S. 40, 58 (concurring opinion); *Smith v. California*, 361 U.S. 147.

Even if there were no possible adverse consequences to an individual from his identification as a person who desired to receive "communist political propaganda," the mere fact that an official act is required (i.e. sending back to the government a completed

Form 2153-X) as a condition to the exercise of the First Amendment right to receive mail, is a violation of the Constitution under the ruling in *Thomas v. Collins*, 323 U.S. 516. There a labor union organizer was required to identify himself to an official before giving a speech. This was held to be unconstitutional without regard to whether there were any adverse consequences flowing from the requirement to register. The court said:

As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. * * *

If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirement of the First Amendment (323 U.S. at 539-540).

Still another view of deterrence is provided by *Bantam Books v. Sullivan*, 372 U.S. 58, which concerns itself with official discouragement of the exercise of First Amendment rights through a state's "educational" activities in the field of morals. The court found these practices unconstitutional, stating:

"We are not the first Court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." [Footnote omitted.] 372 U.S. at 67.

In our case, the substance of the program is to label certain mail with the name of a political and economic philosophy opprobrious to most Americans and touched with a tinge of treason. Certainly a citizen would not be amiss in believing that if the government goes to the trouble of sending him special notice of this labeling, there must be something wrong with the product. The official pronouncements of the United States Government carry much weight, and a judgment of worthlessness, or worse, will be heeded by many citizens.

Lastly under this topic, we must consider the provision of section 4008(a) reading "... upon its subsequent deposit in the United States domestic mails ..."

This simply means that there is the power to search for and to inspect and label material printed or otherwise prepared in a foreign country if it is issued "by or on behalf of" a communist country when it is mailed in the United States if it is not a sealed letter and is not addressed to an "exempt" person or agency.

If a U. S. citizen wanted to mail at the book rate Stalin's "Leninism" (printed in England) he would run the risk that the addressee would receive a Form 2153-X notice and decide not to claim the book. To avoid this procedure, the sender might be forced to send the book at first class rates, thus paying a tax to insure that his mail will not be labeled for its political content. Compare *Hannegan v. Esquire*, 327 U.S. 146. We recognize that there is no evidence of extensive application of the screening program to domestic mail, but the power exists and cannot avoid a deterrent effect on the freedom of the mails.

2. Delay

Marcus v. Search Warrant, 367 U.S. 717, and *A Quantity of Books v. Kansas*, 378 U.S. 205, are explicit holdings that detention of First Amendment material will only be countenanced for the shortest period of time, for a legitimate governmental purpose, and only if preceded by an adversary hearing and seized under a proper warrant. The latest figures furnished by the Post Office Department to the Senate Subcommittee on Administrative Practice and Procedure (see note 7, *supra*) show that from January of 1963 to July of 1964, 62 million pieces of mail from foreign countries have been channeled through foreign propaganda units. Of these, 27 million were sealed letters or addressed to exempt addresses. More than 34 million pieces of mail were examined by Customs employees, but only 21½ million pieces were found to be "communist political propaganda." As to

each of these categories various periods of delay are applicable, probably varying from a day to a month, but exact figures are not available. In any event, all delays for the purpose of screening and labeling mail on the basis of its political content are injuries to constitutional rights and a statute allowing such delays is unconstitutional. See also Part B, *infra*.

3. Search and Seizure

There is no constitutional objection to the requirement that goods brought into this country from abroad be submitted for inspection for dutiable or deleterious merchandise. But should a Customs agent, having this authority, tell me that he desired to inspect my luggage to see if there was anything worthwhile to steal, then his power would be subject to question.

Purpose is important. A ticking package may be opened by the Post Office to see if it contains a bomb, but not to see what time it is. A fourth class parcel may be refused delivery by the post office if it contains written letters as to which first class postage is due, but not if the postmaster finds the contents morally offensive (*Hannegan v. Esquire*, 327 U.S. 146).

Under the screening program created by 39 U.S.C. § 4008 the purpose of examining foreign mail is to label it and so interfere with and inhibit its delivery. The examination, then, is for an unconstitutional purpose and ipso facto an unreasonable search. So too is the detention an unreasonable seizure.

"The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. For the serious hazard of suppression of innocent expression inhered in the discretion confided in the officers authorized to exercise the power [of search]." (*Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961)).

In the *Marcus* case the court struck down a statute which, as applied, authorized police officers to obtain a search warrant *ex parte* to search and seize matter which they deemed to be obscene. In emphasizing the special dangers of the search power in the area of free speech the court said:

The authority to the police officers under the warrants issued in this case, broadly to seize "obscene . . . publications", poses problems not raised by the warrants to seize "gambling implements" and "all intoxicating liquors" involved in the cases cited by the Missouri Supreme Court. [Citations.] For the use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publications. * * * The warrants gave the broadest discretion to the executing officers; they merely repeated the language of the statute and the complaints, specified no publications, and left to the individual judgment of each of the many police officers . . . the selection of such magazines as in his view constituted "obscene . . . publications." * * * In consequence there were suppressed and withheld from the

market for over two months 180 publications not found obscene. (367 U.S. 717, 731, 732.)

Section 4008 is analogous to the statute struck down in *Marcus*. Administrative discretion is granted to postal and customs authorities to seize and detain all mail coming from designated countries and to classify it according to a definition which is wholly vague and uncertain. The result is that millions of pieces of mail matter, not classified as communist political propaganda, are withheld from addressees for long periods of time. The injury here involved is precisely the same as that involved in the *Marcus* case, and the delay in the circulation of expression protected by the First Amendment is thus caused by an unreasonable search and seizure.

4. Assumption of Undelegated Powers

If we accept the position of the Solicitor General, the government in enforcing section 4008 is acting in a hortatory role, but without forcing its will on anyone and without doing any damage to anyone's "rights." But this is not the measure of government's power under our system of law. We find no authority in the Constitution for the government, state or federal, to evaluate written material, to interpose itself between foreign governments and the people of this land and tell the latter what is propaganda and what is not, what is worthy of their interest, and what is not. We think that if anything was intended to be reserved to the people by the Ninth and Tenth Amendments, it was the power to evaluate their own

reading material without official interference giving the stamp of government approval or disapproval based on political content.

B. THE WHOLLY ARBITRARY ADMINISTRATION OF THE SCREENING PROGRAM, MADE UNAVOIDABLE BY VAGUE AND OVERBROAD STATUTORY STANDARDS, VIOLATES THE GUARANTEE OF DUE PROCESS OF LAW.

The addressee of international mail receives no notice that his property has entered into the screening program unless and until it is actually classified as "communist political propaganda." Then he has twenty days within which to return a notice, abandon the mail, or file suit, in which later case he will be considered as "desiring" the mail whether he likes it or not. No procedure was provided, and none was intended, for a hearing on the question of whether the classified material actually meets the statutory definition. The Solicitor General (Brief, p. 11) informs us that the very idea of a hearing is "frivolous."

We respectfully disagree with the Solicitor and believe that where the government sets itself up to do acts which may cause harm to the public on the basis of the existence of certain facts, the Fifth Amendment requires that an opportunity be given to test the existence *vel non* of those facts. To cite an example, suppose Mr. Fishman decided that England's *New Statesman* was regularly carrying articles issued "by or on behalf of" a communist country and the maga-

zine was "communist political propaganda", regardless of the balance of its content. This would mean that a subscriber would be faced with the fact that every issue of the *New Statesman* would be sent to the propaganda unit where, assuming that each issue would not have to be read and evaluated afresh, it would sit until a post office employee filled out a Form 2153-X and sent it on its way. It is not unusual for the *New Statesman* to be read on the West Coast, but its port of entry is almost certainly on the East Coast. Thus, allow two days for delivery of the notice. Assume that the subscriber is at home and not on vacation and that he promptly returns the notice. Allow two more days for return. Assume the post office is extremely efficient and can mail the periodical out the next day. So the *New Statesman* is delivered only five days later than usual and the subscriber can now reply to his friend at the university or in the State Department who asked him five days ago what he thought of Jones' piece in the current *New Statesman*.

Is this not an injury? And if the Customs Bureau has made an error in classification, should not the subscriber have the chance to present evidence that the *New Statesman* is not "communist political propaganda" to save himself from a continuing injury as to future copies of the periodical? Also is not the subscriber's source of information tainted in a redressable way when a detractor may dismiss it with the comment, "Oh, that's not reliable; the government says it's communist political propaganda"?

The vagueness and overbroadness of the definition of "communist political propaganda" have been discussed at pp. 29 *et seq.* of Appellant's Brief in No. 491, *Lamont v. Postmaster General*. To justify an invasion of the mails on the basis of these standards is to sanction a general search. The overbroadness of statutory authority has been a frequent subject of this court's action of late, as, for instance, *Aptheker v. Secretary of State*, 378 U.S. 500, 12 L. Ed. 2d 992, where the court held:

It is a familiar and basic principle . . . that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." (12 L. Ed. 2d at 998, quoting from *NAACP v. Alabama*, 12 L. Ed. 2d 325, 338.)

Not only does the Customs Bureau have at its disposal a very broad definition of "communist political propaganda", but it has almost unlimited discretion as to what countries' mail to screen, only being limited by the words of section 4008(b): "Issued by or on behalf of any country [etc.] . . ."

Finally, the form of notice used by the authorities (R. 10) is misleading. The addressee is not informed that what is stated to be "communist political propaganda" may be from a non-communist country such as Mexico or Canada. He is not informed that the material may have been subsequently "deposited in the United States domestic mails."

C. THE GOVERNMENT HAS SHOWN NO COMPELLING NEED FOR THIS PROGRAM NOR HAS IT SHOWN THE LACK OF AVAILABLE ALTERNATIVES TO ACCOMPLISH ITS PURPOSE.

The Brief of the Solicitor General cites two governmental purposes "accomplished" by 39 U.S.C. § 4008. The first (Brief, p. 16) is to "protect the sensibilities of the addressees of communist propaganda who were affronted and often harassed by such mail, especially United States citizens of recent foreign origin." The second (Brief, p. 19), is to "deny foreign powers which refused a reciprocal exchange the benefit of having the United States subsidize the delivery of their propaganda to persons who either (a) did not want it or (b) did not subscribe¹¹ and had too little interest to mark a postcard indicating their desire for delivery."

The cases establish that where First Amendment freedoms are threatened, it is the burden of the government to prove a "subordinating interest which is compelling" (*Bates v. Little Rock*, 361 U.S. 516, 524; see also *Sherbert v. Verner*, 374 U.S. 398, 406) and to prove that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights" (*Sherbert v. Verner*, 374 U.S. 398, 407). Neither of these matters has been *proved* by the government, but appellee will seek to demonstrate that the two purposes advanced for the legislation do not meet the standard.

¹¹This phrase must have been written before the Postmaster General's Regional Letter of March 1, 1965.

As to mail which is offensive to recipients, we find it difficult to believe that those who desire not to read should have the power to, infringe the constitutional rights of those who desire to read. We do not believe that the rights are on a parity. The value of the interest protected for the first group seems to be measured by the distance from the mail receptacle to the garbage can. Nevertheless, a complete alternative for the protection of persons who are offended by certain classes of mail is now and has been for years available. This is a post office regulation allowing a patron to authorize the postmaster not to deliver specifically described classes of foreign printed matter (Part 154.11 of the Postal Manual)¹² and, in addition, a post office patron may refuse delivery of any mail (39 C.F.R. 44.1(a)).

The second justification for the statute is to encourage exchange programs with foreign governments by denying a "subsidized" delivery of their propaganda. There is no evidence that any international reciprocal cultural agreements with the Communist bloc have been brought about because of the screening program, but in any event, the testimony is undisputed that (1) the quantity of mail from Communist countries has not decreased¹³ and (2) the taxpayers are paying more money not to deliver the mail than it would cost to deliver it all.

¹²Quoted in Schwartz, *The Mail Must Not Go Through—Propaganda and Pornography*, 11 U.C.L.A. L. Rev. 805, 847.

¹³Testimony of Mr. Fishman, Hearings on Propaganda, pp. 18, 19.

We send, by far, more mail to communist countries than they send to us. (Hearings on Propaganda, p. 56; Schwartz, *The Mail Must Not Go Through—Propaganda and Pornography*, 11 U.C.L.A. L. Rev. 805, 832.) The postage rates on international mail are administratively set (pursuant to statutory authority)¹⁴ and a Post Office spokesman, General Counsel Louis A. Doyle, testified:

I do not agree with Congressman Cunningham that a program administered under this program would serve to further reduce the gap between postal revenues and expenses. * * * International rates are set administratively and it will certainly remain our policy to keep the international service on a break-even basis by affecting changes whenever they are needed.¹⁵

The purported financial savings of this program result from not delivering unwanted mail. Congressman Udall established that this has been running to about 50,000 pieces of mail per year. (Hearings on Propaganda, p. 57.) The Customs Bureau spends some \$230,000 per year on this program (Hearings on Propaganda, p. 14) and, more recently, a post office spokesman testified that his department was spending \$300,000 per year on the program. (Hearings described in note 7, *supra*, p. 258.) This amounts to about \$10 per piece of mail not delivered. This is not a very good record on which to go to the taxpayers.

¹⁴39 U.S.C. 505(a).

¹⁵Hearings Before the Committee on Post Office and Civil Service of The United States Senate on H.R. 7927, 87th Cong., 2d Sess. p. 841. And see Schwartz, *op. cit.*, *supra*, at Note 13, pp. 831-835.

IV

CONCLUSION

This unprecedented invasion of First and Fifth Amendment rights by Congress is an affront to our concept of freedom and ought to be struck out of our laws. The judgment of the court below was right and should be affirmed.

Dated, April 16, 1965.

Respectfully submitted,

MARSHALL W. KRAUSE,

COLEMAN A. BLEASE,

American Civil Liberties Union
of Northern California,

LAWRENCE SPEISER,

Attorneys for Appellee.

(Appendices Follow)

Appendix I

Post Office Department
Office of the General Counsel
Washington, D.C. 20260

In reply refer to
WFL:fr
42-A-4

February 25, 1965

Isidore G. Needleman, Esq.
165 Broadway
New York, New York 10038.

Dear Mr. Needleman:

We are quite mindful of the provision in 39 U.S.C. 4008(a) that the detention-notice procedure "shall not be required in the case of any matter which is furnished pursuant to subscription. . . ."

We are also mindful that many foreign mailers of communist political propaganda place the notation "Subscription Copy" on unsolicited matter in an attempt to circumvent the application of the cited law. In view thereof, we would be remiss in our duty to the Congressional mandate to accept such notation without first seeking the addressee's delivery instruction. We certainly have no way of knowing whether any addressee is a bona fide subscriber to any particular matter without first having contacted him.

For the General Counsel:

Sincerely yours,

/s/ William R. Lawrence,

/s/ William F. Lawrence,

Associate General Counsel.

Appendix II

Immediate Release

March 17, 1961

Office of the White House Press Secretary

THE WHITE HOUSE

President John F. Kennedy, following consultation with the Secretary of State, Dean Rusk, the Postmaster General, J. Edward Day, the Secretary of the Treasury, C. Douglas Dillon and Attorney General Robert F. Kennedy, today ordered discontinuation immediately of the program intercepting communist propaganda from abroad.

A review by the four departments has disclosed that the program serves no useful intelligence function at the present time.

Discontinuance of the program was unanimously recommended by an ad hoc committee of the Planning Board of the National Security Council in a report of June 29, 1960. The Planning Board unanimously concurred in the recommendation of the committee, but the recommendation was not carried forward.

Since 1948 varying degrees of control have been exercised by the Bureau of Customs and the Post Office Department concerning the importation of communist political propaganda. Since 1951 the program has been extended to a spot check or censorship of all mail, except first class mail.

Not only has the intelligence value of the program been found to be of no usefulness, but the program also has been of concern to the Secretary of State in connection with efforts to improve cultural exchanges with communist countries.

Appendix III

LEGISLATIVE HISTORY

A. 1940-1961

The history resulting in Section 4008 began in 1940 when Post Office officials seized large quantities of Nazi propaganda upon arrival in the United States. See generally for a detailed history of the screening program through 1958: Schwartz and Paul, *Foreign Communist Propaganda in the Mails: A Report On Some Problems Of Federal Censorship*, 107 U. Pa. L. Rev. 621 (1959), hereafter referred to as *Schwartz and Paul*. The legal justification for the seizures was found in an opinion by Attorney General Robert H. Jackson. See 39 Ops. Att'y Gen. 535 (1940); *Schwartz and Paul* p. 626. The opinion combined provisions of the Espionage Act and the Foreign Agents Registration Act. "As a consequence of this ruling, postal and customs men were apparently authorized to intercept and destroy any material which either agency considered political propaganda in aid of a foreign government, sent from abroad by any person who, prima facie, would appear to be a foreign agent if he were here." *Schwartz and Paul*, p. 627. The Attorney General's opinion was later incorporated as Rule 50 of the Department of Justice, 28 C.F.R. Sec. 5.50 (1949 ed.). The term "political propaganda" was defined by reference to the Foreign Agents Registration Act. The program of confiscation was discontinued at the end of World War II. *Schwartz and Paul*, p. 628.

With the advent of the Korean war, pressure was generated in the Congress for the resumption of the program but directed at Communist political propaganda. "Federal Bureau of Investigation Agents were notified about recipients who seemed to be getting propaganda in substantial quantities. . . ." *Schwartz and Paul*, p. 630, n. 24. And see Hearings To Investigate The Internal Security Act, 82nd Cong., 1st Sess. 64-65 (1951). The Senate Internal Security Committee carried on investigations of domestic disseminators of Communist propaganda. *Id.* at v.-ix . . . ; 99 Cong. Rec. 3249-56 (1953). These congressional committees gave much of the impetus for the reinstitution of the propaganda program. See *e.g.* Hearings To Investigate The Internal Security Act, 83rd Cong., 1st Sess. 229 (1953).

The revitalized program was operated to confiscate and destroy matter found to be Communist political propaganda. After extensive criticism of the program and the failure of attempts to embody the program in legislation, the program was modified in 1956 to allow the "transmittal of propaganda to persons who have ordered or otherwise solicited such material." *Schwartz and Paul*, p. 640; 28 C.F.R. Sec. 5.6 (Supp. 1962) In 1958 the program was further modified to permit the delivery of Communist political propaganda to persons who had indicated a desire for the matter. A system of notification was devised along with a concomitant system of listing persons who indicated a desire to receive propaganda. This program was carried on until March 17, 1961, when

President Kennedy discontinued the program after considering its impact on national security and foreign policy. See Appendix II.

"The justification for the program," according to the *Schwartz and Paul* article in 1959, "appears to be twofold: to protect the American public, from being swamped and seduced by subversive material; and to prevent the United States from subsidizing propaganda efforts by totalitarian enemies whom we are spending billions, at deficits, to combat." *Schwartz and Paul*, p. 623. The features of the program antedating President Kennedy's order were described by the General Counsel of the Post Office Department, Louis J. Doyle, in 1962 as follows:

"Prior to 1958, an interception program relating to Communist propaganda was in effect. Under this program, printed matter arriving from Communist countries and thought to be Communist propaganda was delivered to addressees if they had specifically indicated they desired it, or if it was addressed to a registered foreign agent, a foreign embassy, a U.S. Government agency, a newspaper, a library or educational institution. In 1958, this policy was amended so that individual addressees who did not come within one of these exceptions were asked whether they wanted the propaganda material addressed to them. If they replied that they did, the material was delivered. Then on March 17, 1961 the interception program of asking individual addressees whether they wished to receive the material was discontinued." *Hearings Before The Committee On Post Office And Civil Service Of The U.S.*

Senate On H.R. 7927 (Postal Rate Revision of 1962), 87 Cong., 2d Sess. 841 (1962).

The reasons for discontinuing the program were explained by Doyle at the same hearings as follows:

"The decision was based on several factors. Among other things, it is important to note that a fairly small percentage of the material being screened had been withheld. In 1960, only about 51½ percent of all printed matter entering at New York City from Communist countries was excluded as propaganda not desired by the addressee.

During 1960, a committee of the National Security Council had recommended the discontinuance of the interception program. The recommendation had been accepted by the Planning Board of the National Security Council.

Also, six legal actions had been filed against the Government questioning the constitutional and legislative authority of the program. The Justice Department was convinced that the program lacked necessary legislative authority and lawyers in the Justice Department agreed that there was a substantial constitutional question which might possibly be resolved against the Government.

Another point which may not have been considered, but which is nonetheless important, is that many people such as researchers, scholars, and Government officials who needed this material complained that it was being unnecessarily delayed." *Id.* at 841-42.

Throughout the period before the discontinuance of the program it was clearly the policy of the Customs

Bureau to cooperate extensively with committees of the Congress, including the House Un-American Activities and the Senate Internal Security Sub-committee, in providing information regarding the operation of the program and the names of addressees of Communist propaganda. "For the close liaison between the Un-American Activities Committee and enforcement officials, see Hearings Before The House Committee On Un-American Activities, 85th Cong., 2d Sess. 2425-27 (1958)." *Schwartz and Paul*, p. 631. A most frequent witness on Communist propaganda during the period in question was Mr. Irving Fishman, then and now, Deputy Director of Customs for New York City. For example, the *Annual Report For The Year 1958 Of The Committee On Un-American Activities* reveals the extraordinary "cooperation" of Mr. Fishman in that year: "Mr. Fishman . . . testified at the New England area hearings, which were held on March 14, 18, 19, 20, and 21, 1958, regarding the influx of foreign Communist propaganda into the New England area." (p. 38). "On June 11 and 12, 1958, hearings based exclusively on Communist propaganda and its dissemination were resumed in Washington, D.C. * * * Mr. Irving Fishman testified that two of the principal channels for capturing the minds of youth were revealed to be the International Union of Students . . . and the World Federation of Democratic Youth. . . ." (p. 39); "At the area hearing held in Atlanta, Georgia, on July 29, 30 and 31, 1958 . . . Mr. Irving Fishman, Deputy Collector of Customs, New York City, testified that residents of the South . . .

were targets for Communist propaganda from abroad.

* * * In his testimony, Mr. Fishman described the type of Communist propaganda . . . destined for a number of these Southern States: * * * It is sent to people who probably will disseminate and redistribute it in domestic and local publications." (p. 40); "Communist propaganda and its dissemination were again a focal point at the committee hearings which were held in Newark, N.J., during September 1958. According to . . . Mr. Irving Fishman, the State of New Jersey ranks fifth in the volume of foreign propaganda received from overseas. * * * Mr. Fishman stated that in order to achieve the dissemination of all such foreign propaganda material within the United States it is absolutely necessary for the people in foreign countries who are putting out this material to have the cooperation of individuals within the United States." (pp. 40-41). In the same year Mr. Fishman was asked by the committee:

"Mr. Arens. You have given the Committee, in private session, lists in great volume of the recipients of this Communist propaganda, have you not?

Mr. Fishman. . That is right."

Hearings, House Committee On Un-American Activities, 85th Cong., 2d Sess. p. 2794 (1958).

B. The Adoption of Section 4008

The Congressional response to the discontinuance of the Communist propaganda screening program by President Kennedy on March 17, 1961 was immediate. Four days after discontinuance Congressman Walter

introduced H.R. 5751 (87th Cong., 1st Sess.) to create a "Comptroller of Foreign Propaganda" with vague powers to screen incoming Communist mail. The bill was referred to the House Un-American Activities Committee and reported out without amendment on April 26, 1961. H.R. Rep. 309, 87th Cong., 1st Sess. (1961).

While the Walter bill was awaiting floor debate on June 29th a new postal rate revision bill, H.R. 7927, was introduced and referred to the House Post Office Committee. And on August 31st, Congressman Glenn Cunningham of Nebraska introduced a bill, H.R. 9004, to empower the Postmaster General to set up a new Communist propaganda program. The bill amended Section 505(a) of Title 39 of the United States Code, which empowers the Attorney General to enter into international postal arrangements and to adjust international postal rates, to provide:

"In furtherance of this authority to counteract adverse usage of the mails and to reduce the domestic postal deficit, no international mail handling arrangement under which any postal rate, whether or not reciprocal, is established, shall permit the receipt, handling, transport, or delivery by the United States Post Office Department of mail matter determined by the Attorney General to be Communist political propaganda.

No United States postal rate shall be available for the receipt, handling, transportation or delivery of mail matter determined by the Attorney General of the United States to be Communist political propaganda financed or sponsored di-

rectly or indirectly by a Communist-controlled government."

On introducing the H.R. 9004, Congressman Cunningham declared:

"I have today introduced a bill to stop the flow of Communist propaganda into this country. I think that many of us are disturbed with the order of the present administration of March 17 which allows this Communist propaganda to come into this country freely and be distributed by the United States postal system free of charge. * * *

I think this is one of the most serious problems we have, to stop this Communist propaganda coming into our country. It is the technique of the Communists to work on the young minds of the various nations." 107 Cong. Rec. 17814 (1961).

Many Congressmen joined in congratulating Cunningham for introducing H.R. 9004. All of them echoed his views. Congressman Judd (late of Minnesota), for example, said:

"It is really incredible that we should allow an avowed and powerful enemy to be pouring poisonous propaganda into the minds of our own youth . . . the untrained and immature minds of our youth." *Id.* at 17815.

No action was taken directly on H.R. 9004. But when the postal rate revision bill, H.R. 7927, was reported out of the House Post Office Committee, it contained the provisions of the Cunningham bill as section 12. The committee report stated that the Cunningham amendment (as it came to be known in

debate) was "for the *purpose* of *excluding* the Communist political propaganda from the U.S. mails." H.R. Rep. No. 1155, 87th Cong., 1st Sess. (1961). (Emphasis added.)

A week later, on September 18, 1961, Congressman Walter moved for consideration of his bill, H.R. 5751, which had been greatly amended. Instead of a screening program, the bill now only required the Postmaster General to post notices in post offices and notify recipients of mail that large quantities of Communist propaganda were being sent through the mails. The bill specifically said: "Nothing in this section shall be deemed to authorize the Postmaster General to open, inspect or censor any mail." Representative Walter attacked the Cunningham amendment as "so vague and ambiguous as to render it incapable of a meaningful legal construction." He also said that "there are substantial doubts as to its constitutionality." 107 Cong. Rec. 20052 (1961). Cunningham answered that the Walter bill was a "powder-puff approach and it certainly will not do what the American people want the Congress to do, and that is to stop this subsidizing of Communist political propaganda." *Id.* at 20054.

The Walter bill passed the House, was sent to the Senate Judiciary Committee and quickly reported out, but bogged down on the Senate floor. This was the status at the end of the 1st Session of the 87th Congress.

In January of 1962, after Congress reconvened, the postal rate revision bill, H.R. 7927, was gutted

and a virtually new bill inserted under the same number. 108 Cong. Rec. 739 (1962). But one section remained intact—the Cunningham amendment. The new bill was brought up for debate on January 23, 1962. After a reiteration of the remarks made about the Walter bill by Cunningham and others, the bill was passed, 108 Cong. Rec. 827 (1962). The only dissenting voice came from Congressman Ryan of New York who branded the Cunningham amendment as “a program of censorship and interception of incoming foreign mail.” *Id.* at 769. An attempt to delete the Cunningham amendment by Ryan was defeated by a vote of 2-127. *Id.* at 770.

On January 25, 1962, H.R. 7927 reached the Senate and was sent to the Committee on Post Office and Civil Service. On the same day Senator Prescott Bush introduced S. 2740 containing an amendment to the postal code on Communist propaganda. The amendment provided:

“Mail matter which originates in a foreign country and which is determined by the Postmaster General to be Communist political propaganda shall be detained by the Postmaster General and the addressee shall be notified that such matter has been received and will be delivered only upon his request. If no request for delivery is made by the addressee within a reasonable time, the matter detained shall be disposed of as the Postmaster General directs. The provisions of this section shall not be applicable with respect to matter addressed to an officer or agency of the Government, a library, or a college or university.”

On introducing the bill, Senator Bush said:

"This legislation is needed to counteract the unfortunate effects of an Executive order, issued on March 17, 1961, in which the President ordered an immediate discontinuation of a program . . . to intercept Communist propaganda from abroad.

The White House, undoubtedly acting upon advice of the Department of State, said the program was being discontinued to help 'improve cultural exchanges with Communist countries.'

It is difficult to understand how subjecting the American people to a continual barrage of unsolicited and unwanted Communist propaganda can improve our relations with the Communist conspiracy which has sworn to overthrow our free institutions." 108 Cong. Rec. 869 (1962).

The Senate Post Office Committee had hearings on the Cunningham amendment to H.R. 7927 (Section 12) on August 21 and 23, 1962. *Hearings Before The Committee On Post Office And Civil Service Of The U.S. Senate On H.R. 7927 (Postal Rate Revision Of 1962)*, 87 Cong., 2d Sess., pp. 827-977 (1962). An extensive array of government and private witnesses appeared in opposition to the Cunningham amendment. The witnesses included the Departments of Justice, Post Office, Treasury, United States Information Agency, Office of Science Information Service of the National Science Foundation, and the Library of Congress. The Department of Justice was represented by Nicholas deB. Katzenbach, now Attorney

General and Byron R. White, now Mr. Justice White. Mr. White stated:

"A free society of course involves risks that some of its members will be misled by untruths or propaganda. On the other hand, in view of the experiences of authoritarian countries over the years, the judgment in this country so far has been that the risks of such a system are greater than one in which an executive officer determines what citizens may or may not read. Section 12 of H.R. 7927 would be a significant move toward the latter type of system. Obviously in the world today, the postal services are among the most important means by which the printed word is spread. . . . [Section 12] would not, as its sponsors claim, simply relieve the people of the United States of the burden of paying for the distribution of Communist political propaganda. It would also frequently operate to deny them the right to receive any such material upon a determination by the Attorney General." *Id.* at 832-833.

The Post Office Department was represented by its General Counsel, Louis J. Doyle and by Tyler Abell, Special Assistant to the Postmaster General. Mr. Doyle said:

"Probably the biggest problem in administering section 12 would be the one of setting up screening points. * * * As I see it, mail would have to be screened at every one of our 45,000 postal locations, or else *delayed* while it was routed through central screening points. * * *

I do not agree with Congressman Cunningham that a program administered under this program

would serve to further reduce the gap between postal revenues and expenses. * * * International rates are set administratively, and it will certainly remain our policy to keep the international service on a break even basis by effecting changes whenever they are needed.

A check of 32 of our largest post offices shows that there have been very few complaints from people actually receiving what they consider to be Communist propaganda. New York City has been averaging 35 complaints a month. At the other large offices we have had anywhere from no complaints at all to one a week." *Id.* at 841-43. (Emphasis added.)

On September 24, 1962, the Senate Post Office Committee reported out its version of H.R. 7927. S. Rep. No. 2120, 87th Cong., 2d Sess. (1962). Included in the bill was a new section 305 on Communist political propaganda. It was a modification of Senator Bush's proposal, S. 2740, and identical to the present Section 4008. 108 Cong. Rec. 20694 (1962). On the following day H.R. 7927 came up for debate on the Senate floor. The principal opposition to Section 305 came from Senator Joseph Clark, who had filed a dissent to the Post Office Committee's inclusion of Section 305. S. Rep. No. 2120, 87th Cong., 2d Sess. at 42-44. Clark first offered an amendment to delete Section 305. It was defeated on a voice vote. 108 Cong. Rec. 20852 (1962). He then offered a substitute incorporating the substance of Congressman Walter's H.R. 5751. It was defeated by a vote of 51-23. *Id.* at 20979. Lastly, Senator Clark attempted an amendment to provide that

Section 305 become operative only when the President determined that it was in the national security interest to do so. This last amendment was also defeated—by a vote of 48-23. *Id.* at 20987. However, the Senate did add an amendment to H.R. 7927 (Section 307) permitting addressees to request Post Office withholding of obscene matter. *Id.* at 21007.

The debate on the Cunningham amendment occupies many pages of the Congressional Record. See 108 Cong. Rec. 20630-20645; 20841-20854; 20977-20989 (1962). Senator Bush, whose proposal served as the basis of Section 305; said:

“The amendment Senators have been discussing has been referred to as the Cunningham amendment. Actually it is a modification of a bill which I introduced on January 25. It is referred to in the committee report in that way. * * *

The amendment to the committee bill . . . merely reinstates the policy which was adopted under President Truman and followed under President Eisenhower. It was discontinued in the Kennedy administration, on the theory that it served no useful purpose. However, it is interesting to note that in 1960 the number of pieces of Communist printed matter turned over by the Post Office Department to the Customs Service, excluding first-class mail, was 21,607,000.

The most vicious propaganda campaign is being conducted against the United States by both Communist China and Communist Russia. Inasmuch as the Communist Party is outlawed by the United States . . .; it is not unreasonable for us to restrict propaganda of a Communist nation, to the extent.

at least, that the people of this country want it restricted." 108 Cong. Rec. 20982 (1962).

Senator Clark engaged in an extensive discussion of the defects of Section 305. He inserted in the record extensive excerpts from the article by Schwartz and Paul demonstrating the long-standing policy of postal censorship of Communist mail. 108 Cong. Rec. 20638-20645 (1962). With respect to the Senate changes in the Cunningham amendment he said:

"Although the Senate version opens up loopholes and lets certain Communist propaganda filter through, nevertheless, it sets up a detention system with respect to the bulk of so-called Communist propaganda, and the recipients would not get the mail unless they take affirmative action. That is censorship, and censorship is prohibited by the first amendment . . .

"... we insult and affront perhaps 95 percent of the American people by the amendment, which says to them in effect, 'You are only a little boy. You may be influenced. You are not a free American citizen. You cannot make up your mind . . . So we will detain your mail and tell you we have it and how evil it is. Later on you may get it, if you take certain actions which may jeopardize your reputation.'" 108 Cong. Rec. 20843 (1962).

The Senate passed H.R. 7927 overwhelmingly. And the Senate version of Section 305 on Communist propaganda was approved by a Conference Committee, 108 Cong. Rec. 22197, 22231-2 (1962), and adopted by both houses. *Id.* at 22604. Congressman Cunningham

was elated at the adoption of the provision on Communist propaganda.

"The House had a very strong . . . section in its bill known as Section 12, the so-called Cunningham amendment. Like the House version I want to say that this amendment in the conference report is a very strong and worthwhile amendment to stop the free delivery of Communist propaganda in the United States postal system. In my opinion it will stop at least 95 percent of Communist political propaganda from being delivered in the United States. It is going to be easily administered; it is going to stop this vicious material from coming into this country and being delivered free. *Section 305 of the conference report accomplishes the same thing as would Section 12 in the House-passed version.*" 108 Cong. Rec. 22601 (1962). (Emphasis added.)

SUPREME COURT OF THE UNITED STATES

NOS. 491 AND 848.—OCTOBER TERM, 1964.

Corliss Lamont, dba Basic
Pamphlets, Appellant,
491 v.
Postmaster General of the
United States.

On Appeal From the United
States District Court for
the Southern District of
New York.

John F. Fixa, Individually
and as Postmaster, San
Francisco, California, et
al., Appellants,

848 v.

Leif Heilberg.

On Appeal From the United
States District Court for
the Northern District of
California, Southern Di-
vision.

[May 24, 1965.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These appeals present the same question: is § 305 (a) of the Postal Service and Federal Employees Salary Act of 1962, 76 Stat. 840, constitutional as construed and applied? The statute provides in part:

"Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be 'communist political propaganda,' shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in

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the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee." 39 U. S. C. 4008 (a).

The statute defines "communist political propaganda" as political propaganda (as that term is defined in § 1 (j) of the Foreign Agents Registration Act of 1938)¹ which is issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions or from which foreign assistance is withheld pursuant to certain specified statutes. 39 U. S. C. § 4008 (b). The statute contains an exemption from its provisions for mail addressed to government agencies and educational institutions, or officials thereof, and for mail sent pursuant to a reciprocal cultural international agreement. 39 U. S. C. § 4008 (c).

To implement the statute the Post Office maintains 10 or 11 screening points through which is routed all unsealed mail from the designated foreign countries. At these points the nonexempt mail is examined by Customs

¹ "The term 'political propaganda' includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence." 22 U. S. C. § 611 (j).

authorities. When it is determined that a piece of mail is "communist political propaganda," the addressee is mailed a notice identifying the mail being detained and advising that it will be destroyed unless the addressee requests delivery by returning an attached reply card within 20 days.

Prior to March 1, 1965, the reply card contained a space in which the addressee could request delivery of any "similar publication" in the future. A list of the persons thus manifesting a desire to receive "communist political propaganda" was maintained by the Post Office. The Government in its brief informs us that the keeping of this list was terminated, effective March 15, 1965. Thus, under the new practice, a notice is sent and must be returned for each individual piece of mail desired. The only standing instruction which it is now possible to leave with the Post Office is *not* to deliver any "communist political propaganda."² And the Solicitor General advises us that the Post Office Department "intends to retain its assumption that those who do not return the card want neither the identified publication nor any similar one arriving subsequently."

No. 491 arose out of the Post Office's detention in 1963 of a copy of the *Peking Review* #12 addressed to appellant, Dr. Corliss Lamont, who is engaged in the publishing and distributing of pamphlets. Lamont did not respond to the notice of detention which was sent to him but instead instituted this suit to enjoin enforcement of the statute, alleging that it infringed his rights under the First

² A Post Office regulation permits a patron to refuse delivery of any piece of mail (39 C. F. R. § 44.1 (a)) or to request in writing a withholding from delivery for a period not to exceed two years of specifically described items of certain mail, including "foreign printed matter." *Ibid.* And see Schwartz, *The Mail Must Not Go Through*, 11 U. C. L. A. L. Rev. 805, 847.

and Fifth Amendments. The Post Office thereupon notified Lamont that it considered his institution of the suit to be an expression of his desire to receive "communist political propaganda" and therefore none of his mail would be detained. Lamont amended his complaint to challenge on constitutional grounds the placement of his name on the list of those desiring to receive "communist political propaganda." The majority of the three-judge District Court nonetheless dismissed the complaint as moot, 229 F. Supp. 913, because Lamont would now receive his mail unimpeded. Insofar as the list was concerned, the majority thought that any legally significant harm to Lamont as a result of being listed was merely a speculative possibility, and so on this score the controversy was not yet ripe for adjudication. Lamont appealed from the dismissal, and we noted probable jurisdiction. 379 U. S. 926.

Like Lamont, appellee Heilberg in No. 848, when his mail was detained, refused to return the reply card and instead filed a complaint in the District Court for an injunction against enforcement of the statute. The Post Office reacted to this complaint in the same manner as it had to Lamont's complaint, but the District Court declined to hold that Heilberg's action was thereby mooted. Instead the District Court reached the merits and unanimously held that the statute was unconstitutional under the First Amendment. 236 F. Supp. 405. The Government appealed and we noted probable jurisdiction. 379 U. S. 997.

There is no longer even a colorable question of mootness in these cases, for the new procedure, as described above, requires the postal authorities to send a separate notice for each item as it is received and the addressee to make a separate request for each item. Under the new system, we are told, there can be no list of persons who have manifested a desire to receive "communist political

propaganda" and whose mail will therefore go through relatively unimpeded. The Government concedes that the changed procedure entirely precludes any claim of mootness and leaves for our consideration the sole question of the constitutionality of the statute.

We conclude that the Act as construed and applied is unconstitutional because it requires an official act (*viz.* returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights. As stated by Mr. Justice Holmes in *Milwaukee Pub. Co. v. Burleson*, 255 U. S. 407, 437 (dissenting): "The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues"³

We struck down in *Murdock v. Pennsylvania*, 319 U. S. 105, a flat license tax on the exercise of First Amendment rights. A registration requirement imposed on a labor union organizer before making a speech met the same fate in *Thomas v. Collins*, 323 U. S. 516. A municipal licensing system for those distributing literature was held invalid in *Lovell v. Griffin*, 303 U. S. 444. We recently reviewed in *Harman v. Forssenius*, 380 U. S. —, an attempt by a State to impose a burden on the exercise of a right under the Twenty-fourth Amendment. There, a registration was required by all federal electors who did not pay the state poll tax. We stated:

"For federal elections, the poll tax is abolished absolutely as a prerequisite to voting, and no equiva-

³ "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare." *Pike v. Walker*, 121 F. 2d 37, 39. And see *Gellhorn, Individual Freedom and Governmental Restraints* (1956), p. 88 *et seq.*

lent or milder substitute may be imposed. Any material requirement imposed upon the federal voter solely because of his refusal to waive the constitutional immunity subverts the effectiveness of the Twenty-fourth Amendment and must fall under its ban." *Id.*, p. —.

Here the Congress—expressly restrained by the First Amendment from "abridging" freedom of speech and of press—is the actor. The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. Just as the licensing or taxing authorities in the *Lovell*, *Thomas*, and *Murdock* cases sought to control the flow of ideas to the public so here federal agencies regulate the flow of mail. We do not have here, any more than we had in *Hannegan v. Esquire, Inc.*, 327 U. S. 146, any question concerning the extent to which Congress may classify the mail and fix the charges for its carriage. Nor do we reach the question whether the standard here applied could pass constitutional muster. Nor do we deal with the right of customs to inspect material from abroad for contraband. We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in

sending for literature which federal officials have condemned as "communist political propaganda." The regime of this Act is at war with the "uninhibited, robust, and wide-open" debate and discussion that are contemplated by the First Amendment. *New York Times Co. v. Sullivan*, 376 U. S. 254, 270.

We reverse the judgment in No. 491 and affirm that in No. 848.

It is so ordered.

MR. JUSTICE WHITE took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

NOS. 491 AND 848.—OCTOBER TERM, 1964.

Corliss Lamont, dba Basic
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[May 24, 1965.]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE GOLDBERG joins, concurring.

These might be troublesome cases if the addressees predicated their claim for relief upon the First Amendment rights of the senders. To succeed, the addressees would then have to establish their standing to vindicate the senders' constitutional rights, cf. *Dombrowski v. Pfister*, 380 U. S. 479, 486, as well as First Amendment protection for political propaganda prepared and printed abroad by or on behalf of foreign government, cf. *Johnson v. Eisentrager*, 339 U. S. 763, 781-785. However, those questions are not before us, since the addressees assert First Amendment claims in their own right: they contend that the Government is powerless to interfere with the delivery of the material because the First Amendment "necessarily protects the right to receive it." *Martin v. City of Struthers*, 319 U. S. 141, 143. Since the decisions today uphold this contention, I join the Court's opinion.

It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. See, *e. g.*, *Bolling v. Sharpe*, 347 U. S. 497; *NAACP v. Alabama*, 357 U. S. 449; *Kent v. Dulles*, 357 U. S. 116; *Aptheker v. Secretary of State*, 378 U. S. 500. I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

Even if we were to accept the characterization of this statute as a regulation not intended to control the content of speech, but only incidentally limiting its unfettered exercise, see *Zemel v. Rusk*, 381 U. S. —, —, we "have consistently held that only a compelling [governmental] interest in the regulation of a subject within [governmental] constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP v. Button*, 371 U. S. 415, 438. The Government's brief expressly disavows any support for this statute "in large public interests such as would be needed to justify a true restriction upon freedom of expression or inquiry." Rather the Government argues that, since an addressee taking the trouble to return the card can receive the publication named in it, only inconvenience and not an abridgment is involved. But inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government. See, *e. g.*, *Freedman v. Maryland*, 380 U. S. 51; *Garrison v. Louisiana*, 379 U. S. 64; *Speiser v. Randall*, 357 U. S. 513. The registration requirement which was struck down in *Thomas v. Collins*, 323 U. S. 516, was not appreciably more burdensome.

Moreover, the addressees' failure to return this form results not only in nondelivery of the particular publication but also of all similar publications or material. Thus, although the addressee may be content not to receive the particular publication, and hence does not return the card, the consequence is a denial of access to like publications which he may desire to receive. In any event, we cannot sustain an intrusion on First Amendment rights on the ground that the intrusion is only a minor one. As the Court said in *Boyd v. United States*, 116 U. S. 616, 635:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

The Government asserts that Congress enacted the statute in the awareness that Communist political propaganda mailed to addressees in the United States on behalf of foreign governments was often offensive to the recipients and constituted a subsidy to the very governments which bar the dissemination of publications from the United States. But the sensibilities of the unwilling recipient are fully safeguarded by 39 C. F. R. § 44.1 (a) (Supp. 1965) under which the Post Office will honor his request to stop delivery; the statute under consideration, on the other hand, impedes delivery even to a will-

ing addressee. In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose. Cf. *Butler v. Michigan*, 352 U. S. 380. The argument that the statute is justified by the object of avoiding the subsidization of propaganda of foreign governments which bar American propaganda needs little comment. If the Government wishes to withdraw a subsidy or a privilege, it must do so by means and on terms which do not endanger First Amendment rights. Cf. *Speiser v. Randall*, *supra*. That the governments which originate this propaganda themselves have no equivalent guarantees only highlights the cherished values of our constitutional framework; it can never justify emulating the practice of restrictive regimes in the name of expediency.

MR. JUSTICE HARLAN concurs in the judgment of the Court on the grounds set forth in this concurring opinion.